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RECORD, CASE No. 13,878.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 261.

SIR PETER COATS, THOMAS COATS, JAMES COATS, ARCHIBALD COATS, JAMES COATS, JR., THOMAS GLEN COATS, PETER COATS, JR., AND GEORGE COATS, APPELLANTS,

vs.

THE MERRICK THREAD COMPANY AND HERBERT F. PALMER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 22, 1889.

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1 [L. S.] The President of the United States of America to The Merrick Thread Company and Herbert F. Palmer, Greeting:

You are hereby commanded that you and each of you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit court, in equity, on the first Monday of August, A. D. 1883, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Sir Peter Coats, Thomas Coats, James Coats, Archibald Coats, James Coats, Jr., Thomas Glen Coats, Peter Coats, and George Coats, doing business under the firm name of J. & P. Coats, and do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, on the 30th day of June, in the year one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and seventh.

TIMOTHY GRIFFITH, *Clerk.*

VARNUM & HARISON,
Compl'ts' Sol'rs.

The defendants are required to enter appearance in the above cause in the clerk's office of this court on or before the first Monday of August, 1883, or the bill will be taken *pro confesso* against them.

T. G., *Clerk.*

2 (Endorsed:) I hereby certify that on the 3rd day of July, 1888, at the city of New York, in my district, I personally served the within subpœna upon the within-named The Merrick Thread Company and Herbert F. Palmer by exhibiting to said Herbert F. Palmer, agent of said company, the within original, and at the same time leaving with him a copy thereof. Dated New York, July 18, 1883. (S'g'd) Joel B. Erhardt, U. S. marshal, S. D. N. Y.

(File-mark:) U. S. circuit court. Filed July 18, 1883. Timothy Griffith, clerk.

3 Circuit Court of the United States for the Southern District of New York, in the Second Circuit, In Equity.

Sir PETER COATS, THOMAS COATS, JAMES COATS, Archibald Coats, James Coats, Jr., Thomas Glen Coats, Peter Coats, Jr., and George Coats, Doing Business under the Firm Name of J. & P. Coats, Plaintiffs,
against
THE MERRICK THREAD COMPANY and HERBERT F. PALMER, Defendants.

Bill of Complaint.

To the judges of the circuit court of the United States for the southern district of New York, in the second circuit:

Sir Peter Coats, Thomas Coats, Archibald Coats, James Coats, Jr., Thomas Glen Coats, Peter Coats, Jr., and George Coats, residents of Paisley, Scotland, and James Coats, a resident of Providence, in the State of Rhode Island, all of whom are citizens of the Kingdom of Great Britain, bring this their bill against the Merrick Thread
4 Company, a corporation organized under the laws of Massachusetts, and having an office for the transaction of business at No. 23 Thomas street, in the city of New York, and Herbert F. Palmer, the representative manager and agent of said company in the city of New York; and thereupon your orators (hereinafter designated as the plaintiffs) complain and say:

First. The plaintiffs are a copartnership doing business under the firm name of J. & P. Coats, and are, by and through the Conant Thread Company, in which they own a controlling interest, manufacturers and sellers of sewing thread on spools at Pawtucket, in the State of Rhode Island, and at Paisley, Scotland, in the Kingdom of Great Britain.

The said firm of J. & P. Coats has been since about the year 1830 engaged in the manufacture and sale of sewing threads on spools, and since the year 1840 the thread made by them has been and still is sold largely in the United States, where agents have been employed by them for many years and are still employed to sell the same and to protect the said firm against counterfeit and spurious imitations of said thread.

Since about the year 1869 said firm has also been engaged in the manufacture of said thread at Pawtucket, in the State of Rhode Island.

Second. The business conducted by the plaintiffs is very large and valuable and has been constantly and steadily increasing in value for many years past.

The quantity of such sewing thread sold in the United States is very large, and the plaintiffs have gone to an expense of many thousand dollars in order to make a superior and honest article of such thread, and their sales of it are great, especially in the principal cities of the United States, and it is well known to the trade as "J. & P. Coats' thread" and by their designation, figures, labels, and marks hereinafter mentioned.

The thread made by the plaintiffs is of the best character and quality and has earned a great reputation in the United
5 States and elsewhere by reason of its superior value, character, and quality, and the name, marks, and designs of "J. & P. Coats' thread" are everywhere recognized, not only among the trade but also amongst the largest and smallest consumers as a guaranty of a first-class and reliable article of merchandise.

All the thread manufactured and sold by the plaintiffs, which is is wound on spools of 200-yard lengths, has been and still is composed of six separate strands carefully twisted together, thereby giving to said thread extra strength and durability, and is known as "six-cord" thread, and was by them first designated and has always since been designated by the plaintiffs upon their labels and wrappers and in their advertisement as "best six cord." Some thread composed of a less number of strands than six, and known as "three-cord" thread, is also made and sold by the plaintiffs, but to plainly distinguish it from the plaintiffs' principal and generally and best known manufacture it is and has been always wound in longer lengths than two hundred yards and is wound on larger-sized spools, with labels varying in character from the "six-cord" thread, as hereinafter more particularly set forth.

Third. Many imitations of said "best six-cord" thread have been from time to time attempted, and the plaintiffs, in order to identify and distinguish their thread from those of other manufacturers and to protect their customers and the public from fraudulent simulations and imitations thereof, have from time to time, in accordance with the custom of the trade, adopted peculiar designs, labels, and marks for their goods and have used the same in the course of their business, and said designs, labels, and marks have thereby become well known to the trade and to the general public and have become generally recognized by all purchasers as the distinguishing designs, labels, and marks for "J. &. P. Coats' thread" and as an assurance and guaranty of the genuineness of the goods bearing said designs, marks, or labels.

6 Among said distinguishing designs, labels, and marks used by the plaintiffs for their goods as aforesaid were and are those hereinafter referred to.

Fourth. From about the year 1842 until the present time (and so these plaintiffs continue to trade in it) their style, "J. & P. Coats," with the quantity reeled on each spool, and a designating number and the words "best six cord" were and are all disposed in a particular or fixed manner and so placed and lettered and numbered on a circular black and gilt label upon the end of every spool before sale, and samples of the said labels are contained in Schedule A, hereto annexed, forming part of this complaint; and such circular label, with such words and figures so disposed thereon, has always been one of the designating trade-marks of these plaintiffs in the United States of America. The distinguishing characteristics of the plaintiffs' said label, which has been continuously used by them since the year 1842, have been and are as follows: The label is circular. The ground color of the label has been and is light

gold. Near the margin is a black or substantially black line. Inside said line and in substantially black letters, on a light gold ground, is the firm's name, with the words "best six cord." In the centre of the label is a substantially black circle, and the number of the thread—8, 10, 12, 16, 20, 24, 30, 36, 40, 46, 50, 60, 70, 80, 90, or 100, as the case may be—is in gold color, upon said centre, and said centre also bears the letters and figures "200 y'ds," in small characters.

Fifth. Prior to the year 1869 the heads of the spools whereon the thread manufactured by the plaintiff- was wound were ornamented only by the paper label such as hereinabove described, the surface of the natural wood being either perfectly smooth or else simply stamped with some common ornamental design.

In about the year 1869 the plaintiffs were the first who conceived and adopted the idea of embossing upon the natural wood and upon the outer edge of the heads of spools used by them numerals corresponding with those upon the paper labels pasted upon the
7 centre of such spool heads. The aim and object of embossing said numerals on the edge of the natural wood, as aforesaid, was partly to show the number of the thread in case the paper label containing such number should be defaced or removed, and also to give a distinctive appearance to plaintiffs' spools and indicate by the appearance and design of such spool head and such embossed numerals thereon the origin and manufacturers of the thread upon all spools bearing such embossments upon the spool head, to wit, that the same was of the manufacture of J. & P. Coats.

Sixth. On the 9th day of February, 1875, the plaintiffs, then being in the exclusive possession and use of the trade-marks aforesaid, obtained the registration of a trade-mark at the United States Patent Office, at Washington, the specifications for which were as follows:

Trade-Mark for Spool Cotton.

Statement of trade-mark No. 2213, registered February 9, 1875. Application filed January 25, 1875.

Specification Describing a Trade-Mark Used by J. & P. Coats, of Paisley, in Scotland, for Spool Cotton.

One of our distinctive trade-marks is formed upon the ends of the wooden spools on which sewing thread is wound. It consists of a central label of paper formed of concentric circles of black on a light ground, containing on one of the light bands the words "J. & P. Coats," "Best Six Cord," and on the central black circle the figures and letters "200 yds.," and a numeral, which in the fac-simile which accompanies this specification is the figure 8, but the numeral may be varied. On the end of the spool, surrounding the label, is a peripheral band of the natural wood embossed with an ornamental design of crossed lines and central stars, with intermediate spaces, in which are embossed numerals corresponding to that in the centre

of the label. Other forms of ornamentation may be substituted for
that shown in the peripheral band without altering the char-
8 acter of our trade-mark, the essential features of which are
the label of concentric rings, having in the central spot a numeral, and an embossed peripheral border of the natural wood, including among its ornamental designs the same numeral as that displayed in the centre.

This trade-mark has been used by us in our business for about a year last past. The particular goods upon which we have used it is spool cotton, and the trade-mark covers entirely the end of the spool.

J. & P. COATS,
By JAMES COATS,
A Member of the Firm.

Witnesses:
J. E. ROBERTS.
FRANK B. WEBSTER.

A photolithograph of said trade-mark is annexed to this complaint and marked Schedule B and forms part of this complaint.

Seventh. The spool head ornamentation set forth in said trade-mark has been used by the plaintiffs since about the autumn of 1873, and is still in use by them — all of the spool thread now manufactured or sold by the plaintiffs since about the autumn of 1873, and is still in use by them (except those known as "long lengths," hereinafter referred to) having upon the spool heads the essential features of said trade-mark, viz., "the label of concentric rings having in the central spot a numeral, and an embossed peripheral border of the natural wood, including among its ornamental designs the same numeral as that displayed in the centre."

Schedule C, annexed hereto and forming a part of this complaint, shows samples of the spool heads so used by the plaintiffs.

The plaintiffs allege that they were the first manufacturers or dealers in spool thread who used as a distinctive mark for their goods a spool head bearing the labels and embossment above described or having any resemblance thereto.

Eighth. The plaintiffs further show, as evidence of the im-
9 portance attached by them to the use of the border of the
natural color of the wood of the spools embossed as hereinbefore stated, that on or about the 12th day of March, 1878, they applied for and obtained the registration in the United States Patent Office of an additional trade-mark for spool cotton or cotton thread, to be affixed to packages, counter boxes, cases or wrappers of the goods, or used on advertising signs or labels, the same having been used by the plaintiffs for more than two years prior thereto, which trade-mark, as set forth in the specification and statement annexed thereto, consisted in the representation of a spool of thread upon a red ground, "said spool lying with one end fully shown, but somewhat in perspective, the central part of the end so shown representing a circular label, such as is usually affixed to spools of thread. Upon said circular label are numerals or words, or both, the characters

upon the label or the colors of the label itself being in no respect an essential feature of this trade-mark.

"The color of the spool is the natural color of the wood. The end shown bears ornamental impressions and numerals, which numerals vary on different spools.

Copies of said trade-mark and of the design accompanying the same are annexed to this complaint, and are marked Schedules D^1, D^2, and D^3.

Said trade-mark has been used by the plaintiffs in their business and upon the goods manufactured and sold by them since about the year 1875 or 1876, and is still so used by them.

Ninth. The plaintiffs further show as evidence of the importance attached by them to the use on spools of a peripheral border of natural-wood color having numerals embossed thereon, that in or about the year 1875 they adopted and commenced the use of a varied form of the above device for the protection of the thread manufactured and sold by them, said mark consisting of an embossment of a peculiar form upon the spool head and covering the whole thereof.

The distinguishing characteristics and essential features of
10 such mark have been and are: a spool head ornamented with two concentric circular bands of the natural wood, the outer band embossed with an ornamental design composed of lines, or lines and stars, combined with a numeral repeated at intervals, and the inner band unembossed and unornamented, except stamped with the words "J. & P. Coats' Best Six Cord."

Copies of said mark or distinguishing symbol are shown on Schedule E, annexed to and forming part of this complaint.

This form of mark was and is used only upon the spools containing what is known in the trade as "long lengths" of thread, namely, more than 200 yards of thread upon a larger-sized spool.

Tenth. All and every the aforesaid distinguishing labels, marks, or trade-marks have been upon the spools of the said thread which have been prepared by the said J. & P. Coats and sold in the United States of America for many years past, and these labels, marks, or trade-marks were first used on all and every the same by them and are the common property of the plaintiffs' said firm of J. & P. Coats and of the partners thereof.

Eleventh. The defendants, The Merrick Thread Company, are a corporation having their principal place of business at Holyoke, Massachusetts, and have an office for the transaction of business in the city of New York, and an agent, manager, and representative in said city, to wit, the defendant, Herbert F. Palmer.

The defendant company are manufacturers of spool thread of the same general character as that manufactured by the plaintiffs, but, as the plaintiffs are informed and believe, of an inferior character and quality and not of equal reputation and character in the trade, nor so widely known to the public as that of J. & P. Coats.

The defendant company manufacture "three-cord" thread
11 on spools in lengths of 200 yards, being a thread of inferior grade and strength to that known as "six-cord" thread,

the former being a thread formed of only three strands twisted together, while the later, as hereinabove set forth, is composed of six strands.

The defendant company also manufacture and sell "six-cord" thread on spools in lengths of 200 yards. The defendant Palmer sells, at the city of New York, all of the kinds and styles of thread manufactured by the defendant company.

The plaintiffs manufacture and sell on spools in lengths of 200 yards none but "six-cord" thread, as above set forth, and the defendants come into competition with them only as to that variety of thread and not as to the "three-cord" thread on spools in lengths of 200 yards.

Said defendant company on the spools containing said "three-cord" thread in lengths of 200 yards have paper labels wholly unlike in color and design to any labels used by the plaintiffs and the natural wood of the spool head surrounding said label is perfectly smooth and without any decoration or embossment whatever, either of numerals or of ornamental designs, there being no simulation of or resemblance to the ornamentation or marks upon the spool heads used by the plaintiffs.

Specimens of said defendants' "three-cord" thread spools for lengths of 200 yards are hereto annexed and marked Schedule F.

Both the defendant company and the plaintiffs manufacture and both defendants and the plaintiffs sell "six-cord" thread on larger spools in "long lengths"—that is, in lengths of more than 200 yards.

Twelfth. In or about the month of August, 1879, the plaintiffs first learned that spool heads bearing an embossment and mark closely resembling their own, and especially the distinguishing marks or symbols of the plaintiffs hereinabove in the fifth, sixth, and seventh paragraph- of this bill set forth, were being used by certain other manufacturers of spool thread, to wit, the Green
12 & Daniels Manufacturing Co. of Pawtucket, R. I.; S. Semple & Sons, of Mt. Holly, N. J.; Frank O. Ellis, of Lynn, Mass., and the defendants The Merrick Thread Co., on "six-cord" thread.

The plaintiffs forthwith gave written notice, through Varnum & Harrison, their attorneys, to each of the manufacturers or corporations above named that they considered the use of the spool heads so closely resembling those of J. & P. Coats as an infringement of the trade-marks of the plaintiffs and as an attempt to palm off another thread as of the manufacture of J. & P. Coats and requesting them to refrain from the use thereof.

Prompt and courteous replies were received from the three manufacturers or corporations first named disclaiming any knowledge or intention of violating or infringing upon the plaintiffs' rights and stating that they would refrain from the further use of such designs upon their spool heads, and, as your plaintiffs believe, said promises and assurances have since been faithfully and honorably kept by them.

The defendants also replied, disclaiming any intent by using the said marks to lead purchasers to suppose that they were buying the

goods of J. & P. Coats, professing their disposition to investigate the matter, and stating that they had no wish or desire to benefit themselves from the reputation of J. & P. Coats, but proposed to stand on their own reputation.

As the plaintiffs believe, the defendants thereafter ceased to use until quite recently said spool-head embossments and marks simulating and resembling those of the plaintiffs, or if they were used such fact did not come to the knowledge of the plaintiffs.

Thirteenth. The plaintiffs have recently learned and they now aver that the defendants have for some little time past been guilty of unlawful and unfair competition in business, in this, that they have been infringing the rights of the plaintiff in and to the marks, symbols, and labels specified in the fifth, sixth, and seventh clauses hereof by selling in competition with these plaintiffs a spool
13 thread of "six cords" and put up on spools of two hundred yards' length, which thread is not manufactured by these plaintiffs, but is put upon the market and sold, and spread among retailers and customers as well in the city of New York as in other and distant parts of the United States, as and for the thread of these plaintiffs, by reason of the labels, marks, and devices upon the spools whereon said thread is wound, as hereinafter set forth; and the plaintiffs aver that the said defendants, personally or by their clerks or agents, have disposed of said thread with labels upon the spools made in colorable imitation of the plaintiffs' labels, and with a spool-head embossed with a colorable imitation of the spool head device used by the plaintiffs, as specified in the fifth, sixth, and seventh clauses of this bill, and intended as a counterfeit of said device and of the trade-mark used by the plaintiffs, said spool heads having embossed thereon similar numerals disposed in the same manner and in the same relative position as on such originals, and a paper label in the centre thereof in the same general design and in the same coloring and general style of lettering as on the original label.

The plaintiffs aver that said marks, embossment, and labels are a simulation of and infringement upon the marks of J. & P. Coats hereinabove set forth in the fifth, sixth, and seventh clauses of this bill, and especially of the labels, trade-marks, and distinguishing marks and symbols described and herein set forth in said fifth, sixth, and seventh clauses. All of said marks, symbols, and labels specified in the fifth, sixth, and seventh clauses are similarly used and sold by the defendants conjointly and together upon single spools.

The defendant company have been manufacturing and the defendants have been openly and knowingly selling such thread bearing such simulated and fraudulent labels and marks at their offices, No. 23 and 25 Thomas street, in the city of New York, and the defendant corporation has also been making such sales at its offices in Holyoke and Boston, Massachusetts, and elsewhere within the United States.

14 The defendants by such sales have been the means of passing off such thread upon customers in different parts of the

United States to a considerable extent as and for the genuine thread of "J. & P. Coats."

The thread so dealt in by the said defendants was and is, as to its labels, designs, and engravings, as plaintiffs believe, gotton up by or through the instrumentality, orders, or sanction of the said defendants in imitation of and so as to have the general appearance of the said thread of the said plaintiffs, made up and marked as specified in the fifth, sixth, and seventh clauses of this bill as aforesaid, and so that the same may pass by sales to and through jobbers and into the hands of tailors, illiterate women, and others buying by retail and using sewing thread, and they be deceived, on account of resemblance, into purchasing such simulated article as the genuine thread of the said plaintiffs, the defendants obtaining thereby the profit and advantage of the plaintiffs' name, style, and reputation in such sales and depriving the plaintiffs of the market which they had originally and lawfully obtained in the manner aforesaid for the sale of their said thread and the profits they would have made thereon, imposing thereby on the public and greatly injuring the plaintiffs.

The plaintiffs believe that the said defendants have made large sales of such thread bearing said simulated marks or labels and reaped large profits therefrom by selling the same to merchants, jobbers, and others.

Also that the said defendants have a large quantity of the simulated article on hand for sale, and are engaged in or contriving to sell the same, to the great damage of these plaintiffs.

By reason of the illegal, unfair, and fraudulent acts aforesaid of the said defendants the plaintiffs are deprived of sales which they would otherwise make and enjoy of their said thread in the cities of New York and Boston and other parts of the United States, and the said simulated article being of inferior quality and made at less cost and with less care, the same is sold at a less price than that for which the plaintiffs would readily sell their thread.

15 As the plaintiffs are informed and believe, the defendants knowingly and unfairly deal in said spurious and simulated article of thread, which is gotten up in imitation of the plaintiffs' thread, with the view to impose the same upon dealers and retailers as the genuine thread of the plaintiffs.

In all and every sale of such spurious thread so made by the said defendants the same was at the time of sale to customers on spools with the false labels, marks, inscriptions, and colorable imitations hereinabove referred to, and the plaintiffs have in Schedule- G and H, hereto annexed, set forth specimens of the spurious labels taken from spools purchased of the defendants, and also samples of the imitation spool heads and imitations of plaintiffs' spool-head trademark hereinabove set forth, which have been and still are used by the defendants on the goods manufactured or sold by them.

The said defendants knowingly continue to vend or cause to be vended or aid in vending the said spurious thread so made in fraud of the said plaintiffs' genuine article, to their very great damage, and

will continue to do so unless restrained by the injunction order of this honorable court.

These plaintiffs are by all the unlawful acts of the said defendants above and before detailed greatly damaged.

Wherefore the plaintiffs demand that the said defendants and their agents, clerks, workmen, cartmen, and servants and each and every of them may be restrained and enjoined by injunction order from infringing the trade-mark or unfairly competing with the plaintiffs by simulating the marks and symbols specified in the fifth, sixth, and seventh clauses hereof by using any of the said simulated labels, marks, designs, devices, or impressions upon the spool heads of the spools whereon any of the thread manufactured or sold by the defendants is wound, and also from disposing of, selling, or causing to be sold, hypothecating, or circulating any of such thread with said marks, labels, designs, devices, or trade-
16 marks on the spools thereof in simulation of those used by the plaintiffs on the spools containing the thread known as J. & P. Coats' thread, and from using or disposing of any of such simulated labels, marks, designs, devices, or trade-marks whatever until the further order of this court.

Also that the said defendants may account for all merchandise bearing such simulated or spurious marks, labels, designs, devices, or trade-marks now on hand, and also account for all profits of which they have deprived these plaintiffs by sales of thread bearing such simulated marks and pay the damages they have sustained by means of the frauds and premises aforesaid; also that a receiver be appointed of all thread on hand bearing such simulated marks.

And the plaintiffs pray that the defendants may be ordered and adjudged to pay said damages and profits when ascertained, and that a perpetual injunction issue from this court to stay the manufacturing, getting up, vending, and dealing in spool thread bearing such simulated marks, labels, designs, devices, or trade-marks, and the manufacture or use of any such simulated marks, labels, designs, devices, or trade-marks; and the plaintiffs pray for such other and further relief as to the court may seem meet and proper under the circumstances and for their costs and disbursements herein, and that a writ of subpœna may issue out of this court to the said defendants.

And the complainants will ever pray, &c.

New York, May, 1883.

J. & P. COATS,
By JAS. COATS,
A Member of Said Firm.

VARNUM & HARRISON,
Plaintiffs' Attorneys, 110 *Broadway, New York.*
BENJAMIN F. THURSTON, *Of Counsel.*
FREDERICK H. BETTS, *Of Counsel.*
JAMES M. VAKNUM, *Of Counsel.*

17 UNITED STATES OF AMERICA, }
District of Rhode Island, } *ss:*

James Coats, being duly sworn, deposeth and saith—

That he is a member of the firm of J. & P. Coats and one of the complainants in the foregoing bill named, and that he has read the same and knows the contents thereof.

That the said bill is true of his own knowledge, except as to those matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JAS. COATS.

Sworn to before me this 18th day of June, 1883.

WM. W. DOUGLAS,
U. S. Commissioner, District of Rhode Island.

(Endorsed:)

18 United States Circuit Court, Southern District of New York.

SIR PETER COATS *et al.*
vs.
THE MERRICK THREAD COMPANY *et al.*

Please enter our appearance for the defendants in the above-entitled case.

Dated New York, Aug. 6th, 1883.

BROWNE & WITTER,
Solicitors for Defendants and of Counsel.

(Endorsed:) U. S. circuit court, southern district of N. Y. Sir Peter Coats *et al. vs.* The Merrick Thread Co. *et al.* Notice of appearance. Browne & Witter, solicitors for def'ts and of counsel, 32 Park Pl., N. Y.

(File-mark:) U. S. circuit court. Filed Aug. 6, 1883. Timothy Griffith, clerk.

19 United States Circuit Court, Southern District of New York.

SIR PETER COATS *et al.*
v.
THE MERRICK THREAD CO. *et al.*

The answer of The Merrick Thread Co. and of Herbert F. Palmer, the above-named defendants, to the bill of complaint of the plaintiffs above named.

These defendants, now and at all times hereafter saving and reserving unto themselves all and all manner of benefit and advantage of exception that can or may be had or taken to the many errors, uncertainties, and other imperfections in the plaintiffs' said bill of complaint contained, for answer thereto, or unto so much and such

parts thereof as these defendants are advised it is material or necessary for them to make answer unto, answering, say:

They admit that Sir Peter Coats, Thomas Coats, Archibald Coats, James Coats, Jr., Thomas Glen Coats, Peter Coats, Jr., and George Coats, residents of Paisley, Scotland, and James Coats, a resident of Providence, in the State of Rhode Island, are all citizens of the Kingdom of Great Britain, and that the Merrick Thread Company is a corporation organized under the laws of Massachusetts, having its principal place of business at Holyoke, Mass., and an office for the transaction of business at No. 23 Thomas street, in the city of New York, but they deny that Herbert F. Palmer, one of the defendants herein, is the representative manager and agent of the said Merrick Thread Company in the city of New York.

And these defendants, further answering, say that they do not know and are not informed, save by the said bill of complaint,
20 whether the said plaintiffs are copartners doing business under the firm name of J. & P. Coats, or are, by and through the Conant Thread Company, manufacturers and sellers of sewing thread on spools at Pawtucket, in the State of Rhode Island, and at Paisley, Scotland, in the Kingdom of Great Britain, or whether or not the said plaintiffs own a controlling interest in said Conant Thread Co., or whether the said firm has been engaged in the manufacture and sale of sewing thread on spools since the year 1830, or whether the thread made by them has been since the year 1840 and still is sold largely in the United States, or whether agents have been employed as alleged, or whether said firm has been engaged in the manufacture of said thread at Pawtucket in, the State of Rhode Island, since about the year 1869, and they leave the plaintiffs to make such proof thereof as they may be advised is material; and these defendants further say that they do not know and are not informed, save by the said bill of complaint, whether the business conducted by the plaintiffs is very large and valuable or has been increasing in value, as alleged; whether the quantity of such sewing thread sold in the United States is large, or whether the plaintiffs have gone to an expense of many thousand dollars in order to make a superior and honest article of such thread, or whether their sales of it are great, especially in the principal cities of the United States, as in said bill alleged, and they leave the plaintiffs to make such proof thereof as they may be advised is material.

And these defendants admit that the thread made and sold by the plaintiffs herein, as alleged, is well known to the trade as "J. & P. Coats' thread," and is so known by reason of said name being affixed to spools and boxes containing such thread, but deny that it is so known to the trade by reason of any other designations, figures, labels, or marks whatsoever.

And these defendants furthermore deny that the thread
21 made by the plaintiffs is of the best character and quality, but, on the contrary, allege that a large part of said thread is of an inferior character and quality. They further deny that the thread made by the plaintiffs has earned a great reputation in the United States and elsewhere by reason of its superior value, char-

acter, and quality, and they deny that the name, mark, and designs of "J. & P. Coats' thread" are or ever have been a guaranty of a first-class and reliable article; but whether or how far they have been so considered, as alleged in the bill, these defendants do not know and are not informed, save by the said bill of complaint, and they leave the plaintiffs to make such proof thereof as they may be advised is material.

And these defendants, further answering, deny that all the thread manufactured and sold by the plaintiffs, which is wound on spools purporting to be of 200-yard lengths has been or still is composed of six separate strands twisted together, or that all of such thread wound on such spools has been or still is "six-cord" or "best six-cord" thread, or what is known as "six-cord" or "best six-cord" thread; these defendants admit that twisting six separate strands together confers extra strength and durability upon the thread, as alleged in said bill, and they allege that it is for this and other reasons that six-cord thread enjoys its high reputation in the market and is the best sewing cotton or best spool cotton, and is known as the best sewing cotton or best spool cotton; and they furthermore say that they do not know and are not informed, save by the said bill of complaint, whether such thread wound on such spools was by the plaintiffs first designated as "best six-cord," and leave the plaintiffs to make such proof thereof as they may be advised is material; but they admit that all the thread manufactured and sold by these plaintiffs which is wound on spools purporting to be of 200-yard lengths is known as—that is, generally understood to be—"six-cord thread," and has always been and now is designated by said plaintiffs upon their spool heads, labels, boxes, and wrappers
22 and in their advertisements, circulars, bills, and bill-heads, etc., as "best six-cord," or by words or marks to that effect.

And these defendants further deny that all the plaintiffs' thread composed of a less number of strands than six, which kind of thread is known as "three-cord" thread, is and always has been plainly distinguished from their principal and best-known manufacture, the aforesaid six-cord thread; and they deny that all the three-cord thread made and sold by the complainants is wound in longer lengths than two hundred yards or on larger sized spools or with labels varying in character substantially from those used on "six-cord" thread.

And these defendants are not informed, except by the bill, and cannot answer whether or not imitations of the said best six-cord thread have been attempted, or whether peculiar designs, labels, or marks for their goods have been adopted and used by the plaintiffs, or have thereby become well-known to the trade and public, or recognized as the distinguishing designs, labels, or marks of the plaintiffs' thread, and leave the plaintiffs to prove the same as they may be advised; but these defendants, on information and belief, deny that the designs, labels, or marks specifically referred to in the bill were adopted and used by the plaintiffs as distinguishing, or have been generally recognized by purchasers as distinguishing the goods manufactured by the plaintiffs, or as an assurance or guaranty

of the genuineness of the goods bearing such designs, labels, or marks.

And these defendants further say that they do not know and are not informed, save by the said bill of complaint, whether the plaintiffs used in 1842, or have ever since used, the circular black and gilt label with their style "J. & P. Coats," the alleged quantity reeled on each spool, a designating number, and the words "best six-cord," disposed as set forth in said bill in paragraph "fourth" of the same and shown in Schedule A, plaintiffs' exhibit, and they leave
23 the plaintiffs to make such proof thereof as they may be advised is material; but on information and belief they deny that such labels have been used on every spool of the plaintiffs' thread before sale, and they deny that in the case of those spools in which such labels were used the quantity actually reeled on each spool was equal, or substantially equal, to the quantity declared upon such label to be so reeled on the spool.

And these defendants deny that such circular label with such words and figures so disposed thereon, as alleged in the bill, has always been or is now one of the distingushing trade-marks of the plaintiffs in the United States.

And these defendants admit that prior to 1869 the heads of the spools whereon the thread manufactured by the plaintiffs was wound were ornamented by the paper label described in said bill of complaint, having the surface of the natural wood in some instances perfectly smooth, and in others stamped with some common ornamental design.

And these defendants deny that the plaintiffs were the first to conceive and adopt the idea of embossing upon the natural wood or upon the outer edge of the heads of spools numerals corresponding with those used upon the paper labels pasted upon the center of such spool heads, and they allege that the same was described and patented as a design for the heads of spools by H. Conant in patent No. 3949, issued April 5, 1870, in which patent it was declared that the object of so embossing said numerals on the wood was "to preserve the number of the thread with which the spool is wound after the label has been destroyed;" and such letters patent were, as these defendants are informed and believe, owned and controlled by the said plaintiffs, which patent has since expired, to wit, in April, 1877, to which patent defendants crave leave to refer; and they submit that since the expiration of the said patent the use of such
24 numerals embossed upon the wood in connection with paper labels as aforesaid has become public property and open to the defendants and all others to employ if they see fit. These defendants allege that long prior to the year 1869 embossing and stamping upon the outer edge of spool heads numerals indicating the number of the thread wound on such spools was well known and used in this country.

And these defendants are not informed, save by the said bill, and cannot answer whether the aim and object of the said plaintiffs in embossing said numerals on the edge of the natural wood was as alleged in the bill, in paragraph "fifth" of the same, and they leave the

plaintiffs to make such proof thereof as they may be advised, but deny that this embossing gave a distinctive appearance to plaintiffs' spools, or indicated by the appearance or design of such spool head or such embossed numerals thereon the origin or manufacturer of the thread, or that the same was of the manufacture of J. & P. Coats.

And the defendants admit that the plaintiffs obtained registration of the alleged trade-mark No. 2213 on Feb. 9, 1875, as set forth in paragraph "sixth" of said bill of complaint, but they deny that the said plaintiffs were at the time of such registration in the exclusive possession and use of such alleged trade-mark described in paragraphs "fourth" and "fifth" of said bill of complaint, but whether the spool-head ornamentation set forth in said alleged trade-mark has been used by the plaintiffs since the autumn of 1873, as in said bill of complaint alleged, these defendants are not informed, save by said bill, and cannot answer, and they therefore leave the plaintiffs to make such proof thereof as they may be advised is material, but they deny that they all have among the ornamental designs of the embossed peripheral border the numeral displayed in the center of the paper label.

The defendants further deny that the plaintiffs were the
25 first manufacturers or dealers in spool thread who used as a distinctive mark for their goods a spool head bearing substantially the labels and embossment described in said alleged trade-mark, or a spool head bearing labels or embossment having any substantial resemblance thereto.

And these defendants, further answering, say that they do not know and are not informed, save by the said bill of complaint, whether the plaintiffs on or about the 12th day of March, 1878, applied for or obtained registration in the United States Patent Office of an alleged additional trade-mark described in said bill of complaint, paragraph "eighth," for spool cotton or cotton thread, to be affixed to packages, counter boxes, cases, or wrappers of the goods, or used on advertising signs or labels, or whether the same had been used by them for more than two years prior thereto or since about the year 1875 or 1876, or whether the same is still used by them, and they leave the plaintiffs to make such proof thereof as they may be advised is material.

And these defendants, further answering, say that they do not know and are not informed, save by the said bill of complaint, whether the plaintiffs in or about the year 1875 adopted and commenced the use of the varied form of the above device, as described and shown in said bill of complaint, paragraph "ninth," and in Schedule E, or whether such form of mark was and is used only upon spools of more than 200 yards in length, and they leave the plaintiffs to make such proof thereof as they may be advised is material.

And these defendants on information and belief deny that all and every the alleged aforesaid distinguishing labels, marks, or trade-marks described and claimed in the said bill of complaint have been used upon the spools of the said thread which have been prepared by the said plaintiffs and sold in the United States for many years past; and they further deny on information and belief that these labels,

marks, or alleged trade-marks were first used on all and every
26 the same by these plaintiffs or are the common property of the plaintiffs' said firm of J. & P. Coats and of the partners thereof.

And these defendants admit that The Merrick Thread Co., one of the defendants herein, is a corporation having its principal place of business at Holyoke, Mass., and having an office for the transaction of business in the city of New York, but deny that Herbert F. Palmer, one of the defendants herein, is the agent, manager, and representative of the said Merrick Thread Company in said city, and they allege that the said Herbert F. Palmer is merely an agent for selling certain classes of thread, receiving a commission on his sales.

The defendants, further answering, admit that the defendant corporation is a manufacturer of spool thread of the same general character as that manufactured by the plaintiffs, but they deny that the said thread is of an inferior character and quality or not of equal reputation and character in the trade as that of J. & P. Coats, as in said bill of complaint alleged.

And these defendants further admit that the defendant corporation manufactures three-cord thread on spools in lengths of 200 yards; that the said three-cord thread is inferior in grade and strength to that known as six-cord thread, being composed of only three strands twisted together, while the six-cord thread, as in said bill of complaint set forth, is composed of six strands twisted together; and they further allege that three-cord thread is and must necessarily be inferior to six-cord thread, and that this is the case in all manufactures of three- and six-cord thread.

And these defendants admit that the defendant corporation also manufactures and sells "six-cord" thread on spools in lengths of 200 yards, but they deny that the defendant Palmer sells, at the city of New York, all of the kinds and styles of thread manufactured by the defendant corporation.

These defendants deny that the plaintiffs manufacture and
27 sell on spools purporting to be in lengths of 200 yards none but "six-cord" thread, as in said bill alleged; but, on the contrary, they allege that the said plaintiffs manufacture and sell large quantities of three-cord thread purporting to be in lengths of 200 yards; that the said thread put up on spools in said alleged lengths of 200 yards, which are numbered 110, 120, 130, 140, 150, and 200, is not six-cord thread, but is three-cord thread—an inferior article—as in said bill alleged, but which, in fraud of the public, is sold as six-cord thread, as hereinafter more particularly alleged.

And these defendants, further answering, deny that they come into competition with the plaintiffs only on said six-cord thread in lengths of 200 yards and not as to the "three-cord" thread on spools in lengths of 200 yards.

And these defendants admit that on the spools containing "three-cord" thread in lengths of 200 yards the paper labels used by the defendants are wholly unlike, in color or design, any label used by said plaintiffs, and that the natural wood of the spool head surrounding said label is perfectly smooth and without any decoration or

embossment whatever, either of numerals or of ornamental designs, and they allege that it is usual and customary and has always been customary among spool-cotton manufacturers to make three-cord thread with designating labels and marks entirely different from the designations and marks used in six-cord thread.

And these defendants, further answering, admit that the defendant corporation manufactures and sells "six-cord" thread on larger spools in lengths of more than 200 yards, and on information and belief admit that the plaintiffs also manufacture and sell "six-cord" thread on larger spools in lengths of more than 200 yards.

And these defendants, further answering, say that they do not know and are not informed, save by the said bill of complaint, whether the said plaintiffs in or about the month of August,
28 1879, or when, if at any time, first learned that spool heads bearing an embossment and mark closely resembling their own, and especially the alleged distinguishing marks or symbols of the plaintiffs in said bill of complaint described, were being used by certain other manufacturers of spool thread named in said bill of complaint, or whether notice was given to such parties by the plaintiffs, other than to the Merrick Thread Co., and replies received thereto, as in said bill alleged, and they leave the plaintiffs to make such proof thereof as they may be advised is material.

These defendants admit that in or about August, 1879, the plaintiffs wrote the defendant corporation a letter, to which the defendant corporation returned an answer, the purport of both of which was substantially as alleged in said bill of complaint.

And they furthermore allege that they investigated the matter as requested in said letter and were confirmed in the opinion which they had entertained that they were not in any way infringing any rights possessed by the plaintiffs herein, and these defendants deny that they thereafter ceased to use the spool-head embossments and marks complained of and claimed by the said plaintiffs as simulating and resembling their own spool-head embossments and marks, but, on the contrary, they allege that they, the said defendants, continued and still continue to use substantially the same spool-head embossments and marks which they had previously been accustomed to use, and they further on information and belief deny that such fact did not come to the knowledge of the plaintiffs, but they allege on information and belief that the said plaintiffs have ever since and all the time been aware of the character of the marks used by the defendants on the thread manufactured and sold by them.

And these defendants, further answering, say that they have never been and are not now guilty of unlawful and unfair compe-
29 tition with the above-named plaintiffs; that they have not been selling and putting upon the market, either in New York or elsewhere, a spool thread of "six cord" and put up on spools of 200-yard lengths or any spool thread whatever as and for thread of the plaintiffs or purporting to be of the plaintiffs' manufacture by reason of the labels, marks, and devices upon the spools whereon said thread is wound; that these defendants have not personally or by their clerks or agents disposed of any thread with

labels upon the spools made in colorable imitation of the plaintiffs' labels or with spool heads embossed with colorable imitations of the spool-head device used by the plaintiffs, intended as or in fact a counterfeit of said device and of the alleged trade-mark used by the plaintiffs; and they further deny that the spool-heads used by these defendants have embossed thereon similar numerals disposed in the same manner and in the same relative position as on the spool heads used by the plaintiffs, or with a paper label in the center thereof having the same general design or in the same coloring and style of lettering as on the label used by the said plaintiffs.

And these defendants, further answering, deny that the marks, embossment, and labels used by the defendant corporation are a simulation of or an infringement upon the marks of J. & P. Coats, and especially of the labels, alleged trade-marks, and alleged distinguishing marks and symbols in said bill of complaint described and set forth.

And these defendants, further answering, deny that they have ever at any time manufactured or sold or are now manufacturing or selling thread bearing any simulated or fraudulent labels and marks, either in New York city or in any other place, as alleged in the bill, or that they have ever passed off thread anywhere or to any extent as and for the thread of J. & P. Coats.

They further deny that they have ever at any time gotten up thread or ordered or sanctioned thread to be gotten up in imitation of or so as to have the general appearance of the said thread of the above-named plaintiffs or so gotten up, made up, or marked as in any way designed to deceive or adapted to deceive or so as in fact to deceive any purchaser thereof by virtue of any resemblance to the marks upon the spools of the plaintiffs into purchasing any thread of the defendants as the thread of the plaintiffs; and the defendants deny that they have in any way obtained or sought to obtain the profit or advantage of the plaintiffs' name, style, or reputation in any sales of spool thread, or that they have deprived the plaintiffs of any market in or any profits from sales of spool thread, except by lawful and honest competition, or that they have in any way imposed or sought to impose upon the public, or that they have done any injury or wrong to the plaintiffs whatever.

On the contrary, these defendants affirm that at all times they have endeavored to mark their goods so that no one could mistake their origin; that their labels and other marks are so different from those of the plaintiffs and of other manufacturers that they are plainly distinguishable therefrom by ordinary purchasers.

And these defendants, further answering, deny that they have ever made large sales or any sales of thread bearing simulated marks or labels or have reaped large profits or any profits whatever from any such alleged sales, and they further deny that they have any such simulated articles on hand for sale or are engaged in selling or in contriving to sell any such simulated articles to the damage of the plaintiffs or otherwise.

And they further deny that they, the said defendants, manufacture any simulated article whatever, and on information and belief

deny that the thread made and sold by them is made at a less cost or with less care than plaintiffs' thread of an alleged corresponding kind and quality, or that it is sold at a less price than the plaintiffs could obtain for like goods of their own manufacture.

31 And these defendants, further answering, deny that they deal in said or in any spurious and simulated article of thread or which is gotten up in imitation of the plaintiffs' thread, with a view to impose the same upon dealers and retailers as the thread of the plaintiffs or with any liability to or result in any such imposition.

And these defendants further deny that any thread sold by them was, at the time of such sale, on spools with false labels, marks, inscriptions, or colorable imitations; and they further say that they do not know and are not informed, save by the said bill of complaint, whether the specimens of the alleged spurious labels and the samples of the alleged imitation spool heads and alleged imitations of plaintiffs' spool-head trade-mark set forth in Schedules G and H, annexed to said bill of complaint, were in fact taken from spools purchased of the defendants, and they therefore leave the plaintiffs to make such proof thereof as they may be advised is material.

And these defendants, further answering, deny that they continue to vend or cause to be vended or aid in vending any spurious thread in fraud of the plaintiffs or to their damage; and they further deny that the said plaintiffs are greatly or in any degree damaged by any unlawful acts alleged in said complaint to have been committed by these defendants or by any unlawful acts of the said defendants.

These defendants, further answering, aver that the said plaintiffs have had no lawful trade-mark, property, or right to the exclusive use of any alleged label having gilt and black bands and words and figures arranged and disposed as shown, described, and claimed in the fourth paragraph of said bill of complaint, except as to that peculiarity of arrangement and disposition which is found in the plaintiffs' label and is not found in the defendants'; that so far as regards a label having the general characteristics of con-

32 trasted black and gilt color, concentric circles, and arrangement of the name of the manufacturer and other matters, including the number of the tread with reference to such circles, in which general characteristics the labels of the defendants resemble those of the plaintiffs, labels having the like general characteristics were long before their adoption by the plaintiffs, and have been ever since, used by other manufacturers of cotton thread and never have been and never could be appropriated as the label of the plaintiffs exclusively and never have indicated and never could indicate to the trade that the thread so labeled was of the manufacture of the plaintiffs as distinguished from any other manufacture; that in so far as the defendants' labels resemble those of the plaintiffs, the plaintiffs' labels and the defendants' labels are alike old in the trade and incapable of exclusive appropriation by either; that in those respects in which the plaintiffs' labels are distinguishable from labels used by other manufacturers prior to the plaintiffs' use there

is no resemblance of the defendants' labels to the plaintiffs'. Wherefore the defendants say that even if there be any such similarity between the defendants' labels and the plaintiffs' as alleged in the bill, it is not a similarity which entitles the plaintiffs to maintain any bill against them.

And these defendants, further answering, say that the plaintiffs have no right to maintain this bill against them upon the ground of such general resemblance of labels as exists between the plaintiffs' and defendants' labels in this case for the further reason that labels having the same general resemblance to their own have been used by other manufacturers with the knowledge and acquiescence of the plaintiffs, and so the plaintiffs have lost and abandoned whatever right they might ever have had to relief against the defendants' use of such labels upon the ground of such general resemblance.

And on information and belief the defendants say that,
33 according to the course of trade and business among spool-thread manufacturers, circular labels having the general characteristics, in which alone the labels of the plaintiffs and defendants are alike, namely, contrasted black and gilt color, concentric circles, and arrangement of the name of the manufacturer and other matters, including the number of the thread, with reference to such circles, were at the time of their adoption by the plaintiffs and have been ever since recognized and employed by the trade as indicating not the product of any particular person's manufacture, but simply that the article was the standard commercial article, six-cord spool thread, of the standard length, namely, two hundred yards; that buyers as well as sellers of this article have for many years so and only so understood and been informed by such labels, and that the defendants, when they undertook to make and sell six-cord 200-yards spool cotton, as they had full right to do, did, by their adoption of labels of the general character above referred to, nothing more than affix to each article to be sold the well-understood mark indicating its commercial character, grade, and quality, except as they put into the label their own name as the manufacturer of their own spool thread; and the defendants submit that their use of their label, which, apart from the insertion of their own names therein, indicates by its character and design and is understood by the trade to indicate the commercial character, grade, and quality of the article, is for that reason a use which it is lawful for them to make and against which this bill cannot be maintained.

And the defendants, further answering, say that embossing the number of the thread upon the wooden rim surrounding the label produces no effect to the eye of the ordinary purchaser distinguishable from that produced by embossing other matters around labels of the same general appearance as had been practiced before the plaintiffs' adoption of such embossing, and therefore is not and never was properly and truly a part or element of a trade-
34 mark, and is not and never was recognized by buyers or sellers as having any such function or as indicating anything respecting the special origin or ownership of the goods; that the use

of said peripheral embossing of the number has always been, on the other hand, to keep the number of thread on a particular spool exposed to the observation of the user after the corresponding number on the paper label was obliterated and destroyed by the running of a spindle through the spool, as practiced universally in machine sewing, or by other accidental obliteration; that for this purpose the exclusive use of the combination of the indestructible embossed number on the wood with the destructible corresponding number on the paper label could only be secured by letters patent as a new and useful invention under the patent laws.

And the defendants further say that the use of embossing the number of the spool thread on the wood of the spool head around the place for the paper label was patented as a design by letters patent of the United States to Hezekiah Conant, dated April 5, 1870, No. 3949, which patent has now long since expired, and the defendants submit that since such expiration they have the free right to use such design, including any paper label which is not in and by itself an infringement of any lawful trade-mark of the plaintiffs.

And these defendants further allege that whatever lawful trade-mark, property, or right, if any, or whatever right, if any, to the exclusive use of the said alleged trade-mark No. 2213, registered Feb. 9, 1875, described and shown in paragraph "sixth" of said bill of complaint, these plaintiffs may have at any time possessed has been lost and abandoned by them by reason of the same having been openly and publicly used by many other manufacturers for many years with the knowledge and permission of the said plaintiffs.

And these defendants, further answering, allege that whatever right or legal claim these plaintiffs may have possessed at any time, they have now no right or any legal claim to any damages, profits, or costs, or other relief in the premises, for the reason that with full knowledge, as these defendants are informed and believe, of all the marks, labels, advertisements, etc., used by said defendants upon and in connection with their thread, they, the said plaintiffs, have unreasonably neglected and delayed to bring suit against these defendants, and have thereby encouraged the said defendants to continue and given them to understand that they had the right to continue in the practice herein complained of.

And these defendants, further answering, allege that the so-called 200-yard spools of six-cord thread manufactured and sold by plaintiffs contain in great part and are known by the plaintiffs to contain less than 200 yards each, and that the representation by the words and figures "200 yards," forming part of the alleged trade-mark specified in the 5th, 6th, and 7th paragraphs of the bill of complaint, and covering the heads of such spools, is a false representation, whereby the plaintiffs fraudulently secure to themselves large gains and profits, and therefore these defendants allege that the plaintiffs have made use and are making use of said alleged trade-mark as a means of defrauding the public and cannot have the relief sought in their bill of complaint or any relief in a court of equity.

And these defendants, further answering, allege that the so-called

200-yard spools of six-cord thread manufactured and sold by the plaintiffs, which, by means of said alleged trade-mark specified in the 5th, 6th, and 7th paragraphs of the bill of complaint, plaintiffs mark and emboss with certain numbers denoting weight of single yarn employed in the thread, are in the lower numbers, to wit, 8, 10, 12, 14, 16, etc., in fact wound and known to the plaintiffs to be wound with thread made from single yarn of a less weight than the weight of single yarn represented by the number on the spools and are in the higher numbers, to wit, numbers 60, 70, 80, 90, 100,
36 etc, in fact wound and known to the plaintiffs to be wound with thread made from a coarser single yarn than the weight of single yarn represented by the number on the spool, by each of which false representations the plaintiffs fraudulently secure to themselves great gains and profits, and therefore these defendants allege that the plaintiffs have made use and are making use of said alleged trade-mark as a means of defrauding the public and cannot have the relief sought in their bill of complaint or any relief in a court of equity.

And these defendants, further answering, allege that some of the so-called 200-yard spools of thread purporting to be six-cord thread manufactured and sold by plaintiffs, to wit, Nos. 110, 120, 130, 140, 150, and 200, which have on the end of the spool the alleged trade-marks specified in said 5th, 6th, and 7th paragraphs of the bill of complaint in all its essential features and so are represented as wound with six-cord thread, are not in fact wound and are known to the plaintiffs not to be wound with thread composed of six separate strands twisted together, to wit, with best spool cotton or six-cord thread, but are wound with thread composed of only three separate strands of a coarser single yarn twisted together, to wit, inferior spool cotton or three-cord thread, and that the plaintiffs by such fraudulent representation secure to themselves large gains and profits; and these defendants allege that the slight changes made in the label and mark put upon the ends of such spools, to wit, Nos. 110 to 200, inclusive, from the details of said alleged trade-mark specified in the said 5th, 6th, and 7th paragraphs of the bill of complaint, as described in said bill of complaint and as put upon other spools of plaintiffs' manufacture, to wit, the substitution of the words "Best Spool Cotton" for the words "Best Six Cord" on the label, the label otherwise remaining the same, and the substitution of an embossed fancy ornamentation for an embossed number
37 ornamentation on the wooden periphery are non-essential changes, leaving the general appearance of the whole spool head substantially unaltered; and that the marks and symbols thus put upon the end of said spools are, as these defendants believe, used and have been used by plaintiffs for the purpose of deceiving the public and of selling the said inferior three-cord thread as and for the best cotton thread, to wit, best six-cord thread, and therefore these defendants allege that the plaintiffs have made and are making use of said alleged trade-mark as a means of defrauding the public and cannot have the relief sought in their bill of complaint or any relief in a court of equity.

And these defendants pray the same benefits of the facts and things herein set forth as if for the reason thereof said bill had been demurred to where a demurrer would have been proper, and the same benefit thereof as if they had been specially pleaded to the said bill where a plea would have been proper.

These defendants submit to this honorable court that said plaintiffs have no right to any further answer to said bill or to any part thereof than is hereinbefore contained, and no right to any accounting, injunction, or other relief prayed for in said bill; and they humbly pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

MERRICK THREAD CO.
L. R. HOPKINS, *"Pres."*
HERBERT F. PALMER.

BROWNE & WITTER,
Solicitors for Def'ts, 32 Park Place, New York.
CAUSTEN BROWNE,
W. C. WITTER,
Of Counsel.

38 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Lyman R. Hopkins, being duly sworn, deposes and says that he is the president of The Merrick Thread Co., one of the defendants named in the foregoing answer; that he has read the said answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he verily believes it to be true.

L. R. HOPKINS.

Subscribed and sworn to before me this 16th day of January, 1884.

W. H. KENYON,
[L. S.] *Notary Public, N. Y. County.*

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Herbert F. Palmer, being duly sworn, deposes and says that he is one of the defendants named in the foregoing answer; that he has read the said answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he verily believes it to be true.

HERBERT F. PALMER.

Subscribed and sworn to before me this 16th day of January, 1884.

W. H. KENYON,
[L. S.] *Notary Public, N. Y. County.*

39 Circuit Court of the United States for the Southern District of New York.

Sir PETER COATS, THOMAS COATS, JAMES COATS, Archibald Coats, Thomas Glen Coats, Peter Coats, Junior, and George Coats, Doing Business under the Firm Name of J. & P. Coats,
vs.
THE MERRICK THREAD COMPANY and HERBERT F. PALMER.
} Replication.

The replication of the above-named complainants to the answer of the above-named respondents.

The repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver and prove the said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the defendants is uncertain, untrue, and insufficient to be replied unto by the repliants; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

Dated New York city, April 4th, 1884.

VARNUM & HARISON,
110 *Broadway, New York City, Complainants' Solicitors.*

40 "DEFENDANTS' EXHIBIT No. 12, COATS' SPOOL-HEAD DESIGN PATENT."

To all whom it may concern:

Be it known that I, Hezekiah Conant, of Pawtucket, in the county of Providence and State of Rhode Island, have originated and designed a new design for embossing the ends of sewing-thread spools; and I do hereby declare that the following specification is a full, clear, and exact description of the same, reference being had to the drawings making a part of this specification.

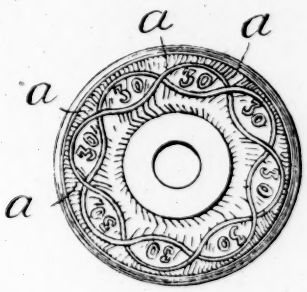
The purpose of the design shown in the drawings is to preserve the number of the thread with which the spool is wound after the label has been destroyed by the act of setting the spool upon the spool-stand of a sewing machine.

Near the outer edge of the head of the spool is embossed in the wood an endless chain of loops, *a a*, formed apparently by arranging two threads so as to cross each other at regular distances. In the eye of the loop the number of the thread is stamped.

What I claim as my invention, and desire to secure by letters patent, is—

The design for ornamenting the ends of sewing-thread spools, which consists in a chain of loops, *a a*, within which loops is a number expressive of the number of the thread wound on the spool, substantially as shown and described.

HEZEKIAH CONANT.



41 "COMPLAINANTS' EXHIBIT COATS' TRADE-MARK OF FEBRUARY 9, 1875."

One of our distinctive trade-marks is formed upon the ends of the wooden spools on which sewing thread is wound. It consists of a central label of paper formed of concentric circles of black on a light ground, containing on one of the light bands the words "J. & P. Coats," "best six cord," and on the central black circle the figures and letters "200 yds." and a numeral, which in the fac simile which accompanies this specification is the figure 8, but the numeral may be varied. On the end of the spool, surrounding the label, is a peripheral band of the natural wood embossed with an ornamental design of crossed lines and central stars, with intermediate spaces, in which are embossed numerals corresponding to that on the center of the label. Other forms of ornamentation may be substituted for that shown in the peripheral band without altering the character of our trade-mark, the essential features of which are the label of concentric rings, having in the central spot a numeral, and an embossed peripheral border of the natural wood, including among its ornamental designs the same numeral as that displayed in the center.

This trade-mark has been used by us in our business for about a year last past. The particular goods upon which we have used it is spool cotton, and the trade-mark covers entirely the end of the spool.

J. & P. COATS,
By JAMES COATS,
A Member of the Firm.

42 U. S. Circuit Court, Southern District of New York.

Sir PETER COATS *et al.*, Plaintiffs,
against
THE MERRICK THREAD CO. *et al.*

Testimony taken on final hearing on behalf of the complainants, on consent, before Thomas Hunt, notary public in and for the city and county of New York.

NEW YORK, *July* 2, 1884—11 a. m.

Present: Frederic H. Betts, Esq., and James M. Varnum, Esq., for complainants; William C. Witter, Esq., for defendants.

Complainants' counsel offers in evidence certified copy of registered trade-mark for spool cotton in the name of J. and P. Coats, of Paisley, Scotland, dated April 2, 1872, and the same is marked Complainants' Exhibit "Coats' Trade-Mark of 1872," July 2nd, 1884, T. H., N. P.

Also certified copy of registered trade mark for spool cotton in the name of J. and P. Coats, of Paisley, Scotland, dated February 9, 1875, and the same is marked Complainants' Exhibit "Coats' Trade-Mark of February 9, 1875," July 2, 1884, T. H., N. P.

43 Also certified copy of registered trade-mark for counter boxes for spool cotton in the name of J. & P. Coats, of Paisley, Scotland, dated 28 December, 1875, and the same is marked Complainants' Exhibit "Coats' Trade-Mark of December 28, 1875," July 2, 1884, T. H., N. P.

Also certified copy of registered trade-mark for spool cotton or cotton thread in the name of J. & P. Coats, of Paisley, Scotland, and Pawtucket, R. I., dated March 12, 1878, and the same is marked Complainants' Exhibit "Coats' Trade-Mark of March 12, 1878," July 2d, 1884, T. H., N. P.

The defendants' counsel objects to the introduction or use as evidence in this case of "Coats' trade-mark of 1872" on the ground that the same has not been declared upon in the bill; also as irrelevant, incompetent, and immaterial.

Like objections are made to the trade-mark copy of which is marked "Coats' trade-mark of March 12, 1878," and to the trade-mark copy of which is marked "Coats' trade-mark of Dec. 28, 1875;" and the trade-mark copy of which is marked "Coats' trade-mark of Feb. 9, 1875," is objected to as immaterial and all evidence concerning any of said documents is objected to as immaterial.

CHRISTOPHER D. BEALE, a witness called on behalf of the complainant, being duly sworn to tell the truth, the whole truth, and nothing but the truth, deposes and says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?

A. Christopher D. Beale; age, 49 years; salesman for Auchincloss Brothers; residence, Evanston, Ill.

2 Q. What is the business of Auchincloss Brothers?

A. Selling agents for J. & P. Coats' spool cotton.

44 3 Q. How long have you been salesman for said Auchincloss Brothers?

A. Eight years.

4 Q. What have been your duties as salesman?

A. Looking after their general business in the Northwest.

5 Q. What have you sold as salesman for said firm?

A. J. & P. Coats' spool cotton.

6 Q. State generally to what extent you have sold J. & P. Coats' spool cotton and to what localities.

A. States of Michigan, Illinois, Iowa, and Minnesota. The amount I cannot state, but is very large.

7 Q. Approximate it as nearly as you can.

A. Two million five hundred thousand (2,500,000) dozen per year.

8 Q. Do you know the style of spool and labels used for the J. & P. Coats' spool cotton during the past eight years?

A. Yes; I am very conversant with them in this country.

9 Q. Please examine the specimens of spool heads and labels now shown you and marked Schedule C and state how the spool heads and labels correspond or differ from the spool heads and labels used on the 200-yards spool of the J. & P. Coats spool cotton for the past eight years.

A. I see no difference.

Specimens of spool heads and labels identified by the witness are offered in evidence and marked "Complainants' Exhibit 200 Yards Spool Heads."

10 Q. During the past eight years has the J. & P. Coats spool cotton been sold with any other spool heads or labels than those just shown you for the 200-yards length spools?

A. No.

11 Q. Do you know in the market a spool cotton sold by the Merrick Thread Company?

A. I have seen such a cotton.

45 12 Q. When was your attention first called particularly to the Merrick Thread Company's spool cotton?

A. I have known the Merrick spool cotton for a number of years. My attention was especially called to it on the 2d of February, 1884.

13 Q. Where was this?

A. Keokuk, Iowa.

14 Q. Please state what occurred at the time and place mentioned by you which called your attention specially to the matter.

A. I was in a retail dry-goods store talking with the proprietor upon the different merits of the spool cottons. He drew my attention to the label upon the end of the Merrick spool cotton, saying at the time it was a very easy matter to substitute for Coats' cotton. To prove what he had said in my presence he sold a lady four spools of cotton. She wanted Coats'. He put in one spool of Coats', three spools of Merrick. At that time the deception was not discovered. I asked him if he did not think it would be returned. He said no, as he had often done so before. The only object he had in substituting Merrick for Coats at that time was to show me how easily the consumer could be deceived.

What the retail dealer is alleged to have said is objected to as hearsay by defendants' counsel.

15 Q. Did you call this matter to the attention of your principals at that time?

A. About ten days after.

16 Q. Did you know at the time that there was any controversy between the Messrs. Coats and the Merrick Thread Co.?

A. I did not.

17 Q. Please look at the specimens of spool heads and labels shown on card marked Schedule "G" and state how those spool heads or labels resemble or differ from the spool heads or
46 labels of the Merrick Thread Co.'s cotton which you saw at Keokuk successfully substituted for Coats'.

A. I think they are the same.

The spool heads and labels identified by the witness offered in evidence and marked "Complainants' Exhibit Defendants' 200 Yards Spool Heads."

18 Q. How long have you been connected with the spool-cotton business?

A. Twenty-seven years.

19 Q. How long have you known the gold and black label of the J. & P. Coats' 200 yards spools like the labels shown on "Complainants' Exhibit 200 Yards Spool Heads" as being used on the J. & P. Coats' spools?

A. Since 1856.

20 Q. Please state whether, in your opinion as a practical salesman in the spool-cotton business, the spools having heads and labels of the Merrick Thread Company like those shown in "Complainants' Exhibit Defendants' 200 Yards Spool Heads" would or would

not be likely to be mistaken for the spools of J. & P. Coats having heads and labels like those shown in "Complainants' Exhibit 200 Yards Spool Heads" by ordinary purchasers, giving the ordinary amount of care and attention which such purchasers give in purchasing such articles.

A. Nothing easier.

21 Q. Please state what your own experience has been in regard to the difficulty of distinguishing the said spools of the said two manufacturers.

A. The difficulty that I had was in the same place, at Keokuk. Being a little near-sighted, it became difficult for me to distinguish in the cabinet where they kept their cotton the difference between Coats and Merrick with the light they had in their store.

22 Q. Prior to having your attention called to these spool heads and labels of the Merrick Thread Company had you ever
47 known of the sale in market by any other manufacturer of spool cotton having spool heads and labels so nearly resembling those of Messrs. J. & P. Coats as to be likely to be mistaken for them by customers?

A. I do not.

23 Q. Prior to the introduction of Messrs. J. & P. Coats of spool heads having the numerals corresponding to the number of the thread embossed upon the wood border of the spool heads, had you ever known such device to be adopted by others?

A. No.

24 Q. Before you became connected with the sale of the J. & P. Coats spool cotton, with what other manufactures of spool cotton were you connected?

A. None directly.

25 Q. What was the nature of your business in spool cotton before that?

A. Notion buyer.

26 Q. Did you deal in all kinds of spool cotton?

A. We sold several brands.

27 Q. Such as whose?

A. J. & P. Coats, John Clark's "O. N. T.," Willimantic, Brooks, Orr & McNaughts, Green & Daniels, Willimantic three-cord, Merrick's, and several others of inferior grades.

28 Q. When was it you sold the Merrick cotton—between what years?

A. Between '65 and '71, in a small way.

29 Q. Did the Merrick cotton at that time have any such spool heads or labels as shown on "Complainants' Exhibit Defendants' 200 Yards Spool Heads"?

A. I don't remember about the label; it had embossing on the spool heads.

30 Q. For the last twenty-five years whose manufactures of spool cotton have had the largest sale in this country, according to your experience?

Defendants object to this question as incompetent.

A. I should say J. & P. Coats.

48 Cross-examined by Mr. WITTER:

31 X Q. For whom were you notion buyer? I refer to your answer to Q. 25.

A. J. A. Sweetser & Co., 41 and 43 Warren street, from 1858 to 1863; E. S. Jaffray & Co., 1865 to 1871.

32 X Q. In your answer to Q. 21 you speak of some difficulty you had in distinguishing spools kept in a cabinet by reason of your near-sightedness; who kept the cabinet?

A. William Wiseman & Co., Keokuk, Iowa.

33 X Q. Is Mr. Wiseman the "proprietor" you referred to in your answers to Q.'s 12 to 14, inclusive?

A. Yes.

34 X Q. Referring to "Complainants' Exhibit 200 Yards Spool Heads," I find it contains spool heads bearing labels from 8 to 100, inclusive; are those the only numbers of threads designated as the spool heads upon the exhibit? Are or are there [not] other numbers; and, if so, what?

A. There are other numbers, to wit, 110, 120, 130, 140, 150, and 200.

35 X Q. If spool heads with these higher numbers, with their marks and designations, had been also attached to "Complainants' Exhibit 200 Yards Spool Heads," would you have answered in the same way the questions which have been put to you touching "Complainants' Exhibit 200 Yards Spool Heads," particularly Q's 8, 9, 10, and 19?

A. As to Q. 8, to my best recollection, I should; as to Q. 9, I should, to my best knowledge and recollection; as to Q. 10, I should make the same answer, to my best knowledge and belief. My territory does not use the high numbers; they all looked the same to me at the store; as to Q. 19, the same answer.

Cross-examination closed, except that complainants' counsel agrees, without prejudice to the deposition taken, that if before November 1st, 1884, the defendants' counsel shall desire to put
49 any further cross-interrogatories, such witness will be produced if reasonably accessible.

CHRISTOPHER D. BEALE.

Sworn to before me this 2d day of July, 1884.

THOMAS HUNT,
Notary Public.

HUGH AUCHINCLOSS, a witness called on behalf of the complainants, after being sworn to tell the truth, the whole truth, and nothing but the truth, deposes and says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?

A. Hugh Auchincloss; age, 66; residence, New York; occupation, merchant.

2 Q. Have you any connection with the firm of J. & P. Coats?

A. I am agent for the sale of their thread.

3 Q. What is your firm?

A. Auchincloss Brothers.

4 Q. How long has your firm been agents for the sale of J. & P. Coats' thread?

A. Since about the commencement of 1840.

5 Q. Do you know who composed the firm of J. & P. Coats in 1883? If so, please state whom.

A. The parties composing them were Sir Peter, Thomas, James and Archibald Coats, James Coats, Jr., Thomas Glen Coats, Peter Coats, Jr., and George Coats. Thomas Coats died in the fall of 1883.

6 Q. Where is the principal factory of the firm of J. & P. Coats?

A. At Paisley, Scotland.

50 7 Q. Have said firm any manufactory of sewing thread in the United States; and, if so, where?

A. They manufacture here under the name of the Conant Thread Company, at Pawtucket, R. I.

7 Q. Can you state what the interest of the firm of J. & P. Coats is in the Conant Thread Co.?

A. They own from three-quarters to seven-eighths of the stock.

8 Q. Please state in a general way what has been the extent of the business of J. & P. Coats in selling thread and spool cotton in the United States for the past forty years and their reputation in connection with that business.

A. They manufacture for all over the world; sales in the United States amount to millions of dozens per year. Their reputation is A No. 1. They are considered the best of manufacturers.

9 Q. Are you familiar with the kind and style of label used by J. & P. Coats on their spool heads?

A. I am. I sold the first dozen of their thread that came here.

10 Q. Please look at the samples of labels now shown you and state if those are the labels of that firm.

A. Yes, sir; they are.

11 Q. How long have you known labels like those shown you to be used on J. & P. Coats' cotton?

A. Our firm sold the first dozen sold here in July, 1840, and to the best of my knowledge and belief the labels were the same—black and gold.

12 Q. Since July, 1840, have you ever known any change in the label from that now identified by you?

A. I have not.

Labels identified by the witness are offered in evidence and marked "Complainants' Exhibit Coats' Paper Label."

13 Q. Has any other style of label been ever used on J. & P. Coats' 200-yards spool cotton?

A. None that I ever knew of.

51 14 Q. Have you been the sole agents for said firm in this country?

A. The sole agents in New York; we have the management of it in this country.

15 Q. Did you ever know of the firm of J. & P. Coats adopting in connection with said paper label a peculiar form or style of spool head; and, if so, what was it?

A. We adopted on the head of the spool what is termed "gnarling" or embossing or stamping the number on the head of the spool.

16 Q. Please look at the samples of spool heads marked "Complainants' Exhibit Samples of Spool Heads," and state how they correspond with or differ from the combined label and spool head adopted by said J. & P. Coats.

A. It is exactly the thing, so far as I can remember.

17 Q. State about when it was that J. & P. Coats commenced to use their labels in connection with their embossed spool heads.

A. I should say from 1870 to 1873. I am not positive about the date.

18 Q. Since the firm adopted the spool heads with the numerals embossed on the border have they used that form exclusively?

A. Yes; they have.

19 Q. Did you ever know of the existence prior to the J. & P. Coats black and gold label, "Complainants' Exhibit Coats' Paper Label," of any similar label for spool cotton or one that could be readily mistaken for it?

A. I did not.

20 Q. Did you know of any manufacturer who ever used in trade prior to Messrs J. & P. Coats spool heads with the numeral embossed on the wood border of the spool head?

A. I did not.

21 Q. Are you at the present time actively engaged in the business?

A. Not very.

22 Q. How long is it since you have given attention to the details of the business?

52 A. Nearly ten years—over nine.

23 Q. Are you able, therefore, to state anything in detail in regard to any interference with your business by the defendant The Merrick Thread Co.?

A. My junior partners know more about that; I have not paid any attention to it.

Cross-examined Mr. WITTER he says:

24 Q. How many labels are there on Complainants' Exhibit Coats' Paper Label and to spools containing what number of thread are they applicable?

A. There are two labels: one applicable to number 50 and one to number 40 thread.

By Mr. BETTS:

25 Q. Have J. & P. Coats since 1840 used the same style and ap-

pearance of label on all their other sizes of thread, the numerals only being changed?

A. I never knew of any difference of the six-cord.

Cross-examination closed. Same agreement as to this witness as to witness Beale.

HUGH AUCHINCLOSS.

Sworn to before me this 2d day of July, 1884.

THOMAS HUNT.

Adjourned to July 16 at 11 a. m.

NEW YORK, *July 16th*, 1884—11 a. m.

Examination adjourned by consent to September 10th, 1884, at 11 a. m.

THOMAS HUNT,
Notary Public.

NEW YORK, *September* 10, 1884.

Examination adjourned pursuant to new notice.

THOMAS HUNT,
Notary Public.

53 NEW YORK, *December* 9, 1884, at 1.30 p. m.

Met pursuant to notice.

Present: Frederic H. Betts, Esq., and James M. Varnum, Esq., counsel for complainants; William C. Witter, Esq., counsel for defendants.

FRANK M. SMITH, a witness produced by and on behalf of the complainants, having been first duly sworn to speak the truth, the whole truth, and nothing but the truth, testifies as follows:

1 Q. What is your name, age, residence, and occupation?

A. Frank M. Smith; aged 31 years. I reside at No. 1 Arcade, Providence, Rhode Island, and am by occupation a dealer in fancy goods.

2 Q. How long have you been engaged in your present occupation?

A. Ever since the 10th of April, 1883.

3 Q. Is it a part of your business to deal in spool cotton?

A. It has been and is now.

4 Q. How long have you been accustomed to buy and sell spool cotton?

A. For the past seven or eight years I have had positions of that kind.

5 Q. Before you went into business for yourself in April, 1883, with whom were you connected in business?

A. With J. E. Jones, 24 and 26 Arcade, Providence; then business in dry and fancy goods, both.

6 Q. In whose make of spool cotton have you dealt, either on your own account or for your other employers?

A. Clark's, Willimantic, Merrick's, and probably others. I know there are others, but I have forgotten them—and Coats', I suppose—and Coats' I have.

7 Q. How long have you been accustomed to buy and sell Coats' spool cotton?

A. Well, I have been accustomed to buy it since I have
54 been in business for myself, and have sold it for over fifteen years.

8 Q. Please look at the spool heads on the card marked Schedule C, "Complainants' Exhibit 200 Yards Spool Head," and state if those are the spool heads and labels of the Coats spool cotton with which you have been familiar.

A. They are.

9 Q. Have you been accustomed to deal in spools with longer lengths of cotton than 200 yards?

A. Excepting in inferior qualities. I have sold cheap threads—basting threads—of 500 yards, but not fine threads.

10 Q. You spoke of having dealt in Merrick thread; when first did you commence to deal in the Merrick thread?

A. I cannot tell you exactly, but it was within two or three months after I went into business for myself.

11 Q. Had you ever known of any Merrick thread before that?

A. Not to my recollection.

12 Q. How did it happen that you commenced to deal in Merrick thread at the time mentioned?

A. From the cheapness or lower prices to induce me to take the thread.

13 Q. Did you buy a stock of it?

A. I bought a full assortment required to fill the stock—the numbers.

14 Q. Please look at the spool heads on Schedule G, marked "Complainants' Exhibit Defendants' 200 Yards Spool Heads," and having examined those labels and the number of the thread embossed on wood of the spools, state how those spool heads and labels resemble or differ from those of which you laid in a full assortment in 1883.

A. I should say by the looks they were the same thing as I bought.

15 Q. While you had this Merrick thread in stock and were dealing in it, did you also have in stock and deal in the Coats thread, with labels like those shown on Schedule C?

55 A. I had about two or three numbers—I don't remember exactly—either two or three or three or four, I have forgotten.

16 Q. How did the price of the said Merrick thread compare with the price of the corresponding numbers of the Coats thread?

A. Not remembering exactly, I think it was five and a half per cent. in favor of Merrick's; I could tell by referring to bill.

17 Q. Please state which was the superior quality of thread, if either, Coats' or the Merrick.

Defendants' counsel objects to this question for the reason that the witness has not been shown to be competent.

A. All I know was the recommendation of our customers, which was in favor of Coats.

Answer objected to by defendants' counsel as hearsay.

18 Q. Please state whether you have found it difficult or otherwise to dispose of the Merrick thread, and whether or not you have now ceased buying the same.

A. That was the reason why I ceased buying Merrick's, finding it difficult in many instances to dispose of it.

19 Q. Why did you find it difficult in many instances to dispose of it; what was the difficulty?

A. One reason, not popular; and not giving satisfaction, in some instances.

20 Q. Please state whether, in your opinion as a practical salesman of spool cotton, the Merrick spools having embossed heads and labels like those shown on Schedule G would or would not be likely to be mistaken for the Coats spools, having heads and labels as shown on Schedule C, by ordinary retail customers, giving the ordinary amount of care which such customers give.

A. I have given unintentionally Merrick's thread for
56 Coats'. The way I found it out was by the customer returning Merrick's thread and reminding me of the mistake.

21 Q. Did the customer inquire for Coats' thread at the time of purchase?

A. They did.

22 Q. Did you, yourself, make the mistake of delivering Merrick thread for the Coats'?

A. I did.

23 Q. Did the customer notice the error at the time, or early afterwards?

A. Not until the next day.

24 Q. Have you, yourself, made this error in more than one instance?

A. Not to my recollection. I would not have known that if it had not been returned.

25 Q. When you had inquiries for Coats' thread and had not had the numbers desired, have you ever filled orders with corresponding numbers of Merrick thread?

A. Frequently.

26 Q. Have any of the customers ever detected the fact that Merrick thread had been given them instead of Coats', as far as you know?

A. Only once, to my recollection.

27 Q. Now, what is your opinion as to the probability of ordinary retail customers being deceived by the similarity of the spool heads and labels into thinking that the Merrick thread is the Coats'?

Objected to by defendants' counsel as incompetent.

A. Well, I can only speak for myself in regard to that, that probably nine times out of ten, being in a hurry, I would be as liable to take one for another as the same thread unless I took particular notice. I speak for the time since I have had it.

Cross-examined by Mr. WITTER:

28 X Q. Unless you took notice of what?

A. Unless I took particular notice, and took the spool and read it.

57 29 X Q. On taking the spool to read it, what would you look at to determine whose make it was?

A. To look at the name on the spool.

30 X Q. Is that what the name is there for—that is, to enable people to tell whose make the thread is?

A. Well, I should suppose so.

31 X Q. I see the spool heads of Complainants' Exhibit 200 Yards Spool Heads have a number 4 near the centre of the paper label 8, 10, 12, &c.; what do these numbers indicate to you?

A. I always thought it was the size. I suppose it is.

32 X Q. You know it is intended for that purpose, do you not?

A. To use my own judgment, it is; that's all I know about it.

33 X Q. Is that also true, in your judgment, of the number which appears on the rim of the spool heads outside of the paper label—that is, to indicate the size?

A. Why, certainly, as much as the other.

34 X Q. Do you know why the number appears in both places?

A. I supposed, in case of the paper label being torn off or the number on the paper label, I would refer to that number on the rim.

35 X Q. You mean, I suppose, in order to ascertain the number of the thread?

A. Yes.

36 X Q. Do you know what the words "best six cord" mean upon the label upon the said spool heads?

A. No more than best six cord.

37 X Q. It is descriptive of the thread, is it not?

A. Best quality of thread. I mean that I understand that when the customer sees that he thinks he has the best thread.

38 X Q. Did you deal in any other Coats' thread than the best six cord?

A. Not to my recollection.

39 X Q. What numbers did you deal in of the Coats?

58 A. From 8 to 120, I think, or to 110; I won't be positive—I mean since I begun to sell.

40 X Q. And, so far as you remember, were all of the spool heads of those numbers, from 8 to 120, or 8 to 110, marked in the same way the spool heads upon Complainants' Exhibit 200 Yards "Spool Heads" are?

A. Yes.

41 X Q. When customers want to buy of you thread, how do they indicate which they want?

A. Either ask for a spool of thread or the name upon the spool.

42 X Q. You mean, I suppose, if they want Coats' thread, they ask for Coats'?

A. I do.

43 X Q. And if they want Merrick's, they ask for Merrick's?

A. Yes, sir.

44 X Q. And if they want George Clark's, they ask for O. N. T.?

A. They generally ask for Clark's.

45 X Q. Otherwise for O. N. T.?

A. Seldom.

46 X Q. Have you been in the habit of selling O. N. T.?

A. I have not.

47 X Q. Do you know the different manufactures of Clark's thread?

A. I do not.

48 X Q. From whom did you buy the Merrick's thread which you say you think you bought five and a half per cent. cheaper than Coats'?

A. From Boston agents, I suppose.

49 X Q. Do you recall their names?

A. I do not. I could by referring the bill. The seller came to me.

50 X Q. What quantity did you buy?

A. I can't tell the exact quantity, but I bought a full assortment, with the case or cabinet.

51 X Q. Have you bill with you?

A. I have it in Providence. I have not it here. I did not know that I required it.

59 52 X Q. About how many dozen should you say?

A. I think about sixty dozen. I won't be sure—it is only a rough guess.

53 X Q. And is the thread for sale kept in the cabinet or case?

A. It is.

54 X Q. Was not the name Merrick conspicuous on the cabinet?

A. It was.

55 X Q. And in sight of the customers?

A. Not conveniently.

56 X Q. How convenient was it for the customer to see the cabinet and the name on it—in the place where you kept the cabinet?

A. The cabinet is kept in a dark place behind the counter.

57 X Q. Did you also have a cabinet for the Coats' thread, and, if not, where did you keep Coats' thread?

A. I did not have a cabinet for the Coats'. I keep them with the Willimantic and the Merrick.

58 X Q. Do you mean that you kept all three in the same cabinet?

A. There are about four numbers of Willimantics that I keep in boxes, because I had quite a stock of Merrick's that occupied the cabinet.

59 X Q. I understand you to say, in answer to cross-question 57, that you kept Coats' thread and Merrick's thread in the same place. Am I right?

A. Yes; they were all kept in the same place. There is one part where I keep all the threads together.

60 X Q. Was that place the Merrick cabinet?

A. It was.

61 X Q. In questions 20 and 21 you are referred to a customer who inquired for Coats' thread and was unintentionally given Merrick's instead and who returned the Merrick's thread; when was that incident?

A. I think it was last February; I will not be sure.

62 X Q. When did you buy the Merrick thread?

A. I think it was two or three months after I went into business.

60 63 X Q. Who was the customer?

A. It was a lady. Not being personally acquainted, I cannot tell who she is. I do not know her name.

64 X Q. How do you suppose she discovered that it was Merrick's thread she had received?

A. By the name Merrick's. That was the first time I noticed the similarity in the spools.

65 X Q. How many spools did she buy?

A. Six.

66 X Q. And did you give them to her in a paper?

A. I did.

67 X Q. Do you remember the number of the thread?

A. No. 60.

68 X Q. Were they all six Merrick's?

A. Only two of them were Merrick's.

69 X Q. You speak of some customers who were dissatisfied with the Merrick thread; can you give me the name and address of any such person?

A. When I first kept the thread I gave a few spools to some of my acquaintances. I think I could find them out. The names I don't remember.

70 X Q. Are there any higher numbers of Coats' six-cord thread than No. 120?

A. I do not know. As I said, I was not positive whether it was 120 or 110 that I dealt in.

71 X Q. What do the marks "200 yards" on the label on one end of Coats' spools of thread mean to customers and the trade?

A. The lengths of the thread on the spools, I suppose.

72 X Q. Why do you suppose the number of the thread, which appears on the rim, is put on the rim instead of under the thread or under the label?

A. For reference, in case the paper number would get destroyed.

73 X Q. Is there any other place where it could conveniently be put and serve the purpose for which it was intended?

A. In my opinion, there is not.

61 74 X Q. Is six-cord thread understood by customers and the trade to be better than three-cord thread of the same make?

A. I never had that question asked or mentioned. I do not deal in three-cord thread, so do not know anything about it.

75 X Q. You say that you have filled orders for Coats' thread with Merrick's of the same number when you had not the former, and that, with the exception mentioned by you, the substitution was not detected, so far as you know. Then I presume that you cannot swear but that these customers discovered that they had Merrick's thread?

A. I cannot, with the exception of the two out of six previously mentioned.

76 X Q. Nor can you swear that they were not satisfied with the substitution, can you?

A. I couldn't answer for that.

77 X Q. You say that customers designate what thread they want by stating the name of the maker in case they wish for a particular make. What name do customers use for the thread made at Willimantic, Connecticut?

A. Well, I don't remember of customers asking for any other name excepting Willimantic thread.

78 X Q. What is it that I now hand you?

A. It is a spool of Willimantic thread, No. 50.

79 X Q. Do you find the name Willimantic Linen Company distinctly appearing on the label of the spool?

A. I do.

Defendants' counsel offers this spool of thread in evidence and it is marked "Defendants' Exhibit No. 1, Willimantic No. 50 Thread."

Question and answer and exhibit all objected to as immaterial and as not proper cross-examination, and motion will be made to strike the same out.

80 X Q. What do I now hand you?

A. I read here George A. Clark.

Same objection and notice.

62 81 X Q. Where do you read it?

Same objection and notice.

A. On a spool of thread.

82 X Q. And you judge that what I hand you is a spool of thread of George A. Clark's make, do you not?

Same objection and notice.

A. I do.

The spool is offered in evidence by defendants' counsel and marked "Defendants' Exhibit No. 2, George A. Clark No. 50 Thread."

Same objection and notice.

83 X Q. What do I now hand you?

Same objection and notice.

A. A spool of thread with the name "John Clark, Jr., & Co., No. 50."

84 X Q. Whom do you understand to be the maker of that thread?

Same objection and notice.

A. John Clark, Jr., & Co., I suppose.

Defendants' counsel offers the spool in evidence, and it is marked "Defendants' Exhibit No. 3, John Clark, Jr., & Co.'s No. 50 Thread."

85 X Q. What do I now hand you?

Same objection and notice.

A. A spool of thread with the name "Merrick Thread Co., No. 50."

86 X Q. How do you recognize it as the Merrick Thread Company's make?

63 A. By the name.

Defendants' counsel offers the said spool in evidence and it is marked "Defendants' Exhibit No. 4, Merrick's No. 50 Thread."

87 X Q. What do I now hand you?

Same objection and notice.

A. A spool of thread with the name "J. & P. Coats, spool No. 50."

88 X Q. How do you recognize that as Coats' thread?

Same objection and notice.

A. The style and name upon it.

Defendants' counsel offers the spool in evidence and it is marked "Defendants' Exhibit No. 5, Coats' No. 50 Thread."

89 X Q. Look upon the end of the Coats' spool of thread, opposite the end with J. & P. Coats upon it, and state whose name you find thereon.

Same objection and notice.

A. Andrew Coats.

90 X Q. Read what else you find upon that end of the spool.

Same objection and notice.

A. 11. General agent for the United States.

91 X Q. What do you find on the corresponding end of the Merrick spools of thread?

Same objection and notice.

A. American standard six cord, 200 yards.

64 Redirect by Mr. BETTS:

92 Re-D. Q. In your answer to the eighty-eighth cross-question you said that you recognize the Coats' thread by the style. What did you refer to by the word "style"?

Complainants' counsel hands witness the "spool."

A. Famil-arity with the spool. I have always recognized it—mostly at a glance.

93 Re-D. Q. Is there anything in the style of the label or spool head or both which you recognized as distinguishing Coats' thread?

Objected to by defendants' counsel as leading and suggestive.

A. Well, it is merely the effect and size of the label, and there are several things that I might not explain. I can almost distinguish it from any amount of thread there is, I will say, with the exception of that (pointing out Merrick's).

94 Re-D. Q. Is there any spool cotton that you know of except Coats' and Merrick's that have the numbers embossed on the wood of the spool?

A. Do you mean cotton thread?

95 Re-D. Q. Yes.

Question objected to by defendants' counsel as leading and suggestive.

A. Not that I know of.

Recross:

94 Re-X Q. Have Webster Hazelwood and Joseph Belfield been present during the taking of your testimony?

A. They have; all the time.

95 Re-X Q. Can you distinguish the Merrick's and Coats' spools of thread by the size at the distance at which I placed them—across the examination room?

65

A. I can.

96 Re-X Q. About how much difference do you think there is in the length—in parts of an inch—the spools being each No. 50?

A. I can't tell exactly.

97 Re-X Q. About how much?

A. Probably one-eighth.

By Mr. BETTS:

98 Re-D. Q. Before asking you the question (95) as to your ability to distinguish the difference in size between the Coats and Merrick spools, did the counsel for the defendants put the spools side by side on the table near you, so that any difference would be apparent, and then afterwards move them away across the room while he was asking you the question?

A. I don't understand what is my reply in that.

99 Re-D. Q. I asked you the question as to the fact whether that was done or not?

(Question repeated.)

A. Well, they have not been separated; they were put together.

100 Re-D. Q. I did not mean that they were moved away from each other, but moved away from you. Please hear the question read again.

A. After examining those two spools together so carefully I could tell the difference at that distance.

101 Re-D. Q. Had you examined them side by side, close to you, just before the question was asked?

A. Yes.

102 Re-D. Q. Had you ever had your attention called to the difference of an eighth of an inch in the length of the spools previously?

A. No.

F. M. SMITH.

Sworn to before me this 9th day of December, 1884.

THOMAS HUNT,
Notary Public.

Adjourned until Wednesday, December 10th, 1884, at 11 a. m.

66 NEW YORK, 10 *Dec.*, 1884—11 a. m.

Met pursuant to adjournment.

Present: C. Wyllys Betts, on behalf of complainant-; W. C. Witter, on behalf of defendant-.

JOSEPH BELFIELD, a witness called on behalf of the complainant, being duly sworn to tell the truth, the whole truth, and nothing but the truth, testifies as follows:

Examined by Mr. BETTS:

1 Q. What is your age, name, residence, and occupation?

A. Age, forty-four years; Joseph Belfield; Central Falls, Rhode Island; occupation, employed by the Conant Thread Company in Pawtucket, R. I.

2 Q. How long have you been so engaged by that company?

A. About fourteen years.

3 Q. Are you acquainted with Mr. James Coats, one of the complainants?

A. I am. He is the president of the Conant's Thread Company.

4 Q. Are you familiar with the labels and spool heads of the complainants, J. & P. Coats, for 200-yard spools of their 6-cord thread?

A. Yes, sir (witness looking at Schedule "C").

5 Q. Are you familiar with the spool heads and labels thereon used by the defendants The Merrick Thread Company for 200-yard spools of 6-cord thread, shown in Complainants' Exhibit "Defendants' 200-Yard Spool Heads."

A. I have seen them before, but am not very familiar with them.

6 Q. When did you first see one of them?

A. As near as I can remember, it was in the spring of 1883.

7 Q. Please state who showed it to you then and what occurred at the time.

67 A. It was shown to me by Mr. James Coats, one of the complainants. Mr. Coats told me that he had some of the Merrick's 200 yards spool, and that if I would go with him to his office he would show them to me. On opening his desk he took two spools of thread from some samples and in handing them to me I thought they were J. & P. Coats'. I told him that it was Merrick's spools that he was going to show me. He looked at the spools and said those were Merrick's. As soon as I got them into my own hands I saw they were Merrick's.

8 Q. What did you find that the spool heads and labels thereupon were which Mr. Coats then handed to you? Are they represented by any of the exhibits before you?

A. They are like those (witness referring to Complainants' Exhibit 200 Yds. Spool Thread, Schedule G, with black and gold labels). The number upon them was 40.

9 Q. Then I understand that although you had been familiar with spool heads used by the complainant-, yet upon being shown the 200-yard spool heads for 6-cord thread used by the defendants you were deceived into thinking that they were the complainants' spool heads?

Objected to as leading.

A. I was deceived for the moment.

10 Q. How long had you been familiar with the complainants' spool heads for 200-yards spools of 6-cord thread similar to those shown on Complainants' Exhibit "200 Yards Spool Heads"?

A. Since 1874. Those numerals were put on wood on the outer edge of the spool head. They were put on in 1874. Previous to the numerals being put on, the spool heads were embossed in different designs.

11 Q. Are you familiar with the spool heads used by the defendants for their 200-yards spools of 3-cord thread shown in Complainants' Exhibit "Defendants' 200 Yards Spool Heads," in the
68 red and blue labels, marked Schedule F? If so, how long have you known them?

A. I have seen them, but cannot say how long I have known them. I am somewhat familiar with them.

12 Q. Have you known them for a number of years?

A. Those are the only spool heads of Merrick's in 200 yards that I had seen previous to 1883.

(Witness referring to the red and blue spool heads mentioned — the question No. 11.)

I cannot state the number of years I had known them.

13 Q. But previous to 1883 you had known them for several years?

A. I had.

Cross-examination by Mr. WITTER:

14 X Q. What are your position and duties for the manufacturers of Coats' thread at Pawtucket?

A. I am the general superintendent of the Conant thread works.

15 X Q. Is there any other thread made there than Coats' thread?

Objected to as not cross-examination, and notice is given that the defendants must make the witness their own witness if the examination is to be extended to matters not already referred to by him.

A. The goods are assigned to the Conant Thread Company by Auchincloss Bros., either in raw cotton, cotton yarn, or in hank thread, to be finished by J. & P. Coats.

16 X Q. What I mean to ask is whether the thread made there goes out to the world as J. & P. Coats' thread, has their name upon it, and is known by that name.

A. Yes.

69 17 X Q. I understand you to say that the number of the thread was first embossed in the wood upon the rim of the spool in 1874. What part of the year was that first done, as near as you remember?

A. I did not mean to be so understood; I meant to say that they were first put upon the market in 1874 with the numerals embossed on the wooden rim in the 200-yards spools.

18 X Q. Upon what other spools were the numerals embossed, if any, than the 200-yard spools?

A. They are put on the spools carrying longer lengths than 200 yards.

19 X Q. What lengths?

A. 500 yards, 1,200 yards, and 2,400 yards.

20 X Q. Please now answer what part of 1874 200-yard spools were first put upon the market with the number embossed on the wooden rim.

A. As nearly as I can recollect, in the second quarter.

21 X Q. You say that previous to this time these 200-yard spools had designs embossed on the wooden rim without the number; how many different designs do you remember that were so used?

A. Various designs, such as checkered work, running vines, &c.

22 X Q. Do you remember how long previous to 1874 such designs had been used? State as near as you remember.

A. They have been used ever since I was connected with the Conant Thread Company. How long previous I do not know.

23 X Q. Were these designs used in connection with the labels appearing upon the spool heads of Complainants' Exhibit "200-Yard Spool Heads"?

A They were.

24 X Q. Were the designs also used on the other end of the spool?

A. Not unless by accident.

25 X Q. When did you first know of the number being embossed on the wood of the rim of the 200 yards spools by the Coats people in this country?

70 A. As nearly as I can recollect, it was in 1870 or 1871.

26 X Q. For what purpose was it done then?

A. It was done for reference in case the number on the label should be destroyed, the number on the label being in the centre of the spool opposite the hole, which, being placed on the spindle of the sewing machine, destroyed the number.

27 X Q. The label also sometimes is defaced or lost from the spool in various ways, is it not, so that in such cases also the number embossed in the wood would be left to indicate the number of the thread? That is true, is it not?

A. We endeavored to put the labels on so that they will stick until the thread is used from the spool.

28 X Q. Yes; I so understand it; but the accidents mentioned in X Q. 27 do sometimes happen, do they not, and in such cases the wooden number indicates the number of the thread?

A. I have known the labels to get rubbed off sometimes by accident.

29 X Q. How as to the numeral on the label getting defaced sometimes. That does occur, does it not?

A. If the tickets were well printed I think it would seldom occur.

30 X Q. It is more likely to occur in the hands of the consumer than at the factory, is it not?

A. I am not a consumer.

31 X Q. What numbers of the best six-cord 200-yards thread are made in the greatest quantity by the Conant Thread Company?

A. I do not wish to answer the question.

32 X Q. Why not?

A. Because I do not think I ought to give away my employer's business.

33 X Q. How many dozen per day are made of said thread by the Conant Thread Company which are of numbers finer than 100?

Objected to as immaterial, as the witness is instructed that he is not compelled to answer unless he desires to do so.

71 A. We never tell how much thread we produce.

34 X Q. You decline to answer the question, do you?

A. It would not be to my interest or my employers' to do so.

35 X Q. And you therefore decline, do you?

A. I think it best to decline.

Witness says that with reference to the number of the thread mentioned in answer to question number 8 he would prefer to say 40 or 50.

JOSEPH BELFIELD.

Sworn to before me—

THOMAS HUNT,
Notary Public.

WEBSTER HAZLEWOOD, a witness called on behalf of the complainant-, being duly sworn to tell the truth, the whole truth, and nothing but the truth, testifies as follows:

1 Q. What is your name, age, residence, and occupation?
A. Webster Hazlewood; I am 45 years of age; residence, Salem, New Hampshire; commercial traveller.
2 Q. With what firm or house are you engaged?
A. Messrs. Andrew S. March & Co., Boston, Mass.
3 Q. How long have you been connected with them?
A. The date of my engagement with them was October 23d, 1882.
4 Q. What articles have you been engaged in selling for them from October 23d, 1882, to the present time?
A. Spool cotton.
5 Q. In what way had you been employed previous to your engagement by this house, if at all, in the sale of spool cotton?
A. As salesman for the firm of Callender, McAuslan & Troup, Providence, R. I.
72 6 Q. Are you familiar with the complainants' spool heads similar to those on the "Complainants' Exhibit 200 Yards Spool Heads"?
A. Yes.
7 Q. How long have you been familiar with those spool heads?
A. About ten years.
8 Q. Are you familiar with the kind of thread and the appearance of the thread sold by the complainants upon the spools having such spools heads?
A. Yes.
9 Q. Are you familiar with the spool heads sold by the defendants similar to those upon the Complainants' Exhibit "Defendants' 200 Yards Spool Heads" with the black and gold labels and figures embossed upon the wood?
A. Yes.
10 Q. Can you state from your knowledge of the trade and experience as a practical salesman and commercial traveler in the sale of spool cotton whether or not retail dealers using the ordinary amount of care exercised in the purchase of spool cotton would be likely to be deceived by the appearance of the said defendants' spool heads into the belief that they were purchasing the thread of the complainants?

Objected to as incompetent and immaterial.

A. I think they would be likely or liable to be so deceived.
11 Q. Are you familiar with the appearance of the thread sold by the defendants upon the spools having the spool heads with the black and gold labels similar to those on Complainants' Exhibit "Defendants' 200 Yards Spool Heads"?
A. Yes.
12 Q. Please state what, if anything, is the resemblance or difference in appearance between the said thread of the defendants and

that which complainants sell upon the spools having the
73 spool heads similar to those upon Complainants' Exhibit "200 Yards Spool Heads"?

Objected to as immaterial.

A. There is a strong resemblance in the general appearance of the thread, in my judgment—in the pearl-white color of the thread.

13 Q. Please state what, if anything, is the resemblance or difference between the defendants' spool heads for their 200-yards spools of six-cord thread, such as you have been accustomed to see on the market, and the complainants' spool heads for their 200-yards spools of six-cord thread with which you are familiar.

A. There is a striking resemblance between the two spool heads by reason of the numbers embossed on the outer rim of the spool and the extreme similarity of the black and gold labels upon the head of the spool.

14 Q. What do you understand to be the distinguishing characteristics of these spool heads of the complainants by which they have become known to your customers?

Objected to as leading.

A. The embossed numerals on the outer rim of the spool head and the black and gold label are the principal distinguishing characteristics.

15 Q. Look at the defendants' spool heads with black and gold labels, shown upon the Complainants' Exhibit "Defendants' 200-Yards Spool Heads," and state what, if anything, is the advantage in the spool heads having a label with the number thereupon placed as it is on those labels, in having also the number stamped upon the wood of the spool head.

Objected to as incompetent.

74 A. If I understand the question, the advantage is twofold. The consumer is enabled the more readily to see the number of the cotton, and in case of the label number being destroyed by the sewing-machine spindle he has the number upon the outer margin of the spool to refer to, and in this case the advantage to the defendants also consists in the close imitation of the spool head of the 200-yards goods of J. & P. Coats.

16 Q. In the defendants' labels upon those spool heads is the numeral upon the paper so placed that it can be destroyed by the spindle of the sewing machine?

Objected to as leading.

A. I should say decidedly not.

17 Q. Then, in your judgment, is there any advantage to the defendants in the use of the numbers stamped upon the wood in their spool heads other than that which you have already mentioned, viz., the close imitation of the complainants' spool head?

Same objection.

A. No material advantage.

Cross-examined by Mr. W. C. WITTER:

18 X Q. You say that you are engaged as a commercial traveller with Andrew S. March & Co., Boston. What relation does that firm sustain to J. & P. Coats or the Conant Thread Company, who make the Coats thread in this country?

A. They advertise themselves as the sole New England agents for the sale of Coats' cotton.

19 X Q. Were you ever in the employ of Coats' people?

A. I would like to have the question made a little more intelligible.

20 X Q. I want to know if you ever helped make or sell Coats' thread for the makers of it.

75 A. Not for the makers of it, except as before said. I don't understand the scope of Mr. Witter's question. If the defendants' counsel wish to know whether I have ever been in the employ of Messrs. J. & P. Coats or of the Conant Thread Company of Pawtucket, R. I., I answer never.

21 X Q. State fully in what way you have ever been connected with the making or the sale of Coats' thread, except as traveller for A. S. March & Co.?

A. I have sold Coats' thread with other makes of spool cotton as salesman for Messrs. Callender, McAuslan & Troup, Providence, R. I.

22 X Q. In no other way?

A. No other way that I think of, excepting those already specified.

23 X Q. Were you present during the examination of Joseph Belfield?

A. I was during part, if not all.

24 X Q. Of which numbers do you sell the most Coats' thread?

Objected to as immaterial, not cross-examination, and the witness is instructed that he is at liberty to decline to answer if the answer involves a disclosure of matters which the interests of his employers requires should be kept secret.

A. I decline to answer.

25 X Q. How many dozens do you sell per year for your employers of numbers of thread finer than 100?

Same objection and instruction.

A. I decline to answer.

26 X Q. Are March & Co. the agents for any other spool cotton than Coats'?

A. Not to my knowledge.

27 X Q Is it your practice to sell less than a dozen spools at a time?

A. It is not.

28 X Q. You generally sell a good many dozens of spools at a time. Is that so?

A. Considerable, many.

76 29 X Q. Is it your practice to deliver the goods personally or are they shipped from headquarters?

A. The goods are shipped from the Boston agency to the consumer—I meant to say to the customer; the consumers are retail dealers.

30 X Q. If I understand you, your sales are made to the larger dealers in Coats' thread, who sell to retailers, who sell to people who use the thread. Is that so?

A. Our sales are made principally to what I call jobbers, but we also sell to what are called first-class retailers.

31 X Q. Coats' thread, of which we are speaking, is put up in boxes, a dozen in a box, is it not?

A. It is true about 200-yards goods.

32 X Q. And one or more boxes of such thread is delivered in that form to your customers, according to the number of dozens for which you have received an order. Is not that so?

A. We follow the usual practice among thread dealers.

33 X Q. And I have stated the usual practice in my question 32, including the practice of A. S. March & Co., have I not?

A. So far as I have any knowledge of the subject. I do not ship the goods myself.

WEBSTER HAZLEWOOD.

Sworn to before me—

THOMAS HUNT,
Notary Public.

Adjourned until Monday, the 15th December, at 11 o'clock a. m.

NEW YORK, *December 15th*—11 a. m.

Examination adjourned to December 22d, 11 a. m.

THOMAS HUNT,
Notary Public.

77 NEW YORK, *December 22d*—11 a. m.

Met pursuant to adjournment.

Present: Mr. F. H. Betts and Mr. James M. Varnum, for complainant-; counsel for defendant- not present.

WILLIAM E. BOWKER, a witness called on behalf of the complainant-, after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, deposes and says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?

A. William E. Bowker; age, 42; store, 288 Hanover street, Boston, Mass.; dealer in dry and fancy goods, ladies' and gents' furnishings; residence, 327 Hanover street, Boston, Mass.

2 Q. Is it part of your business to deal in thread or spool cotton; and, if so, for about how many years?

A. I have dealt in thread and spool cotton for at least ten years.

12 M.

Recess until 1.30 p. m., when counsel for defendant- will be present.

1 P. M.

Counsel for complainant- present as before, and for defendant- W. C. Witter.

3 Q. Have you dealt in the spool cotton of Messrs. J. & P. Coates; and, if so, for about how many years?

A. I have dealt in that cotton, but I can't say accurately the number of years.

4 Q. Can you give about how many years?

A. I have for the past two years sure, and, I think, since 1872, more or less.

5 Q. What has been the reputation of Coats' spool cotton for quality and excellence?

A. Good.

78 6 Q. Please look at the specimens of spool heads and labels shown on Schedule "C" and state if those are the spool heads and labels of the Coats' spool cotton with which you have been familiar.

A. I think these are, as I never used but the two-hundred-yards spools, and these are the two-hundred-yards spools represented here.

7 Q. Have you ever purchased and sold any spool cotton of the Merrick Thread Co.; and, if so, when first did you buy any?

A. I have purchased, I think—the first was either the last of March or in April, 1883; that would be a year ago last March or April.

8 Q. And have you sold it since that time?

A. I have.

9 Q. Please state how you were induced to buy any of the Merrick Co.'s spool cotton and through whom you procured it.

A. By giving it to me a little cheaper than I could buy Coates' or Clark's; also by getting wrapping paper with my bill-head on it and also their card free of charge or given with the thread.

I bought it through William G. Pierce, on Washington street, Boston.

10 Q. Did you call on Mr. Pierce to buy thread or did he come to you at this time?

A. He came to see me several times before I bought.

11 Q. Did he show you any specimens or samples of the spools or thread?

A. He did.

12 Q. What was Mr. Pierce's business as you understood it?

A. That he sells spool cotton, men's overalls, and shirts on commission; in other words, a commission merchant or drummer.

13 Q. About how much of the Merrick Thread Co.'s thread did you first purchase through him?

A. I could not say accurately; it was a large cabinet. I could

not say accurately, but somewhere from 150 to 200 dozen, as nearly as I can tell now.

79 14 Q. When you received the spool cotton in question, did Mr. Pierce deliver it to you or did it come direct from the Merrick Thread Co.?

A. He did not deliver it to me. It was billed from the Merrick Spool Cotton Co.

15 Q. Please look at the samples of spools heads and labels shown on Schedule "G" and state whether or not those are the spool heads and labels upon the spools delivered to you on this sale through Mr. Pierce.

A. These look like the same ones.

16 Q. At the time of negotiating this purchase of the Merrick thread was anything said between you and Mr. Pierce in regard to the spool heads and labels and their likeness to those of any other manufacturer; and, if so, what was said?

A. I told him it looked very much like Coats', and he replied and said you can sell it half the time for Coats'. The same conversation also took place when buying from him again this summer.

What Mr. Pierce said is objected to as hearsay

17 Q. What was there about the Merrick thread that made it look very much like Coats'?

A. The formation of spool, the label, and raised letters or figures; without very close scrutiny one would be apt to pick it up and sell it.

Objected to as incompetent by defendants' counsel.

18 Q. Since March or April, 1883, have you had in stock and been selling both the Coats' spool cotton with labels and spool heads like those shown on Schedule "C," and also the Merrick spool cotton with spool heads and labels like those shown on Schedule "G"?

80 A. I have had a little of Coats' and some considerable of Merrick's. I don't know whether I have any of Coats' in stock now or any of Merrick's, as I have not examined in the past two weeks.

19 Q. State whether there is any general demand or inquiry for Coats' thread among your customers when they are buying spool cotton.

A. There is.

20 Q. Please state in detail what your experience is, if any, in regard to the liability of people purchasing a spool cotton to be deceived into supposing Merrick Co.'s spools and thread are those of Coates?

Objected to, as witness is not shown to be competent.

A. I have passed it out unintentionally when in a hurry waiting on customers and having several other customers to wait upon.

21 Q. Have you done this frequently?

Same objection and as leading.

A. Quite.

22 Q. Have you in these instances shown these spools to the customers in the store at the time of sale?

Objected to as leading.

A. I have picked it up and laid it on the show-case while picking up a piece of paper to wrap it up again, where the customer stood.

23 Q. How has your error in regard to the thread became known to you, if at all?

A. By being returned. Some before being used and some the empty spool.

24 Q. How often has this been done?

A. I could not say just how many times.

25 Q. About how many times?

A. I could not say, but I should think as much as a half a dozen, anyway; maybe more.

26 Q. Do you keep the Coats & Merrick thread in the same cabinet in your shop?

81 A. We have kept it; also Clark's.

27 Q. Do you do any manufacturing business in which you have occasion to use spool cotton?

A. I manufacture ladies' suits, wrappers, ladies' underclothing, &c.

28 Q. In such manufacturing business have you had both Coates' & Merrick's spool cotton used?

A. We have; we have given it out with the work to our stitchers.

29 Q. What is your experience as to the relative excellence of the two threads?

A. I have none, only as the stitchers like Coats' best.

30 Q. Has it ever happened in your business that any customers of yours have purchased any of the Merrick spool cotton of you and have afterwards made any complaints about it, supposing it to have been Coats'? If so, what has occurred?

A. I had. One lady got a spool and returned it a few weeks ago and wouldn't have anything in place of it.

31 Q. Have any of your customers who have purchased the Merrick complained of its quality; and, if so, what has been said?

Objected to as leading and calling for hearsay.

A. I have had them buy it and bring it back, as they weren't acquainted with it and had never used it before.

32 Q. Please state, from your experience as a practical salesman of spool cotton, whether, in your opinion, the resemblance between the labels and spool heads of the Merrick Thread Company's spool thread — those of the Coats is or is not sufficiently close as to be likely to deceive customers giving the ordinary amount of care and attention that such customers commonly use.

Objected to as leading and misleading.

A. I think it is.

82 Cross-examined by Mr. WITTER:

33 X Q. In the cases where you unintentionally sold Merrick's thread for Coats' thread what did your customers call for?

A. Coats'.

34 X Q. When customers want Merrick's what do they ask for?

A. Merrick's.

35 X Q. Do you mean that in each case they call for the thread they want by the name of the maker, do you?

A. Usually.

36 X Q. If they want the thread of any particular maker they call for it by the maker's name, do they not?

A. Usually.

37 X Q. What do you mean by usually?

A. By usually I mean that they ask for the kind of goods they want.

38 X Q. By name?

A. Well, now, they do not always call goods by their right names. If you mean spool cotton, they do, and we always give them what they ask for unless we make a mistake, and when trading with our customers we tell them if anything — not right bring back and we'll rectify it.

39 X Q. What do you get a spool for Merrick's?

A. Five cents; it sells very slow at that with us.

40 X Q. What do get for Coats'?

A. The same; and Clark's the same, when we sell it.

41 X Q. By Clark's thread do you mean "O. N. T."?

A. Yes; when I speak of Clark's I speak of both makes.

42 X Q. Who makes the thread known as "O. N. T."?

A. Well, I can't answer that; I don't know whether it is George Clark or John Clark, the white spool or the black, but I think it is George. I can't say positive.

43 X Q. What was the name of the lady referred to by you in answer to question 30?

83 A. I could not give the lady's name, as I do not know the names of half a dozen of those who trade with us.

44 X Q. How long have you been in business for yourself?

A. I cannot answer the number of the years, as I have been alone, then united with my brothers, then alone.

45 X Q. What partner, if any, had you in the spring of 1883?

A. None, nor any since.

46 X Q. How many times have you bought Merrick's thread of Pierce?

A. I cannot say; three or four, I think, but all I ever used was bought through him.

47 X Q. When customers ask for Clark's thread, which do you give them, John's or George's?

A. I cannot say. we usually give them the white spool, as we keep the most of it.

48 X Q. Did Pierce sell the thread to you on commission, or how otherwise, or don't you know?

A. He said that he was getting a commission for selling that; that was the way he received his pay for his services.

Answer objected to as hearsay.

Redirect by Mr. BETTS:

49 Re-D. Q. Do you have much inquiry for Merrick's spool cotton by name?

A. No, sir.

50 Re-D Q. Do you remember ever to have had such an inquiry?

A. No; it sells very slow, and that is why we have allowed ourselves to get out of other cotton, to run that off to get rid of it.

WM. E. BOWKER.

Sworn to before me this 22d day of December, 1884.

THOMAS HUNT,
Notary Public.

84 STEPHEN HAFF, a witness called on behalf of the complainant-, being duly sworn to tell the truth, the whole truth, and nothing but the truth, deposes and says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?

A. Stephen Haff; age, 50 years; residence, Evona, Middlesex county, New Jersey; occupation, salesman.

2 Q. Have you ever purchased any spool cotton of the defendant H. F. Palmer; and, if so, on what date?

A. I purchased 18 dozen of 3-cord spool cotton and 32 dozen of 6-cord Merrick spool cotton on April 26, 1883.

3 Q. Did you receive any bill of the same at the time? If so, please produce it.

A. I produce the bill.

Bill offered in evidence and marked "Defendants' bill."

4 Q. Have you here any spool cotton purchased at the time, for which that bill was given?

A. Yes, sir.

5 Q. Please produce it.

Witness produces four boxes of 6-cord thread and five packages of 3-cord, and they are marked "Exhibit Specimens Defendants' 6-Cord Thread, 1, 2, 3, and 4," and "Exhibit Specimens Defendants' 3-Cord Thread, 1, 2, 3, 4, and 5."

6 Q. Did all the spools of cord thread which you bought have the same spool heads and labels as those produced by you, so far as you examined them?

A. That refers to each particular kind, Mr. Betts, I suppose. So far as I know, they did.

7 Q. Did you examine any of the spool heads and labels of said three-cord thread?

A. I did.

8 Q. I now open one of the packages of three-cord thread
85 and show you the spools and labels therein, and ask how they correspond with the rest of those of the three-cord thread that you bought at the same time.

A. To the best of my recollection, they are the same.

Cross-examined by Mr. WITTER:

9 X Q. What are the numbers of the thread which you have produced here?

A. Said dozens of six-cord thread are numbers 30, 36, 60, and 70. The dozens of three cord thread are numbers 30 (2 p'k'ges), 50 (2 p'k'ges), 70 (1 p'k'ge).

10 X Q. Are you a dealer in thread?

A. I am.

11 X Q. I see that you are charged a good deal more for six-cord than for three-cord thread on the bill which you produced. Why do you pay more for six-cord than for three-cord?

A. The price of six-cord is always higher than three-cord in the market. It is more expensive to make. It is a better thread.

12 X Q. Are you a retailer?

A. No, sir.

13 X Q. What position do you occupy in the market?

A. I am a salesman with Auchincloss Brothers.

14 X Q. Are these people the agents for Coats' thread in this country?

A. They are.

Redirect examination by Mr. BETTS:

15 Re-D. Q. Did Mr. Palmer appear to have a stock of the same thread that you bought on hand at the time of your purchase?

A. He did, with the exception of one or two numbers.

16 Re-D. Q. To what numbers of this Merrick thread of the six-cord kind did Mr. Palmer have in stock at the time bearing labels and spool heads similar to those produced by you?

86 A. I think all those numbers that I bought and similar spool heads. I purchased 15 different numbers, from 8 to 100—numbers 8, 10, 12, 16, 20, 24, 30, 36, 40, 50, 60, 70, 80, 90, 100. These are the numbers that I ordered, but there were one or two that he did not have in stock.

Recross-examined by Mr. WITTER:

17 Re-X Q. Did you buy of Mr. Palmer personally?

A. No.

18 Re-X Q. Of whom?

A. Of Mr. Nathan, his salesman.

19 Re-X —. Did you take the goods with you—any of them—or order them to be sent?

A. I ordered them to be sent.

20 Re-X Q. Where?

A. To 47 and 49 White street.

21 Re-X Q. Did you open any packages of the thread during the purchase or order?

A. No, sir.

22 Re-X Q. Or while you were in the store?

A. Not that I recollect.

23 Re-X Q. Did you see any open; and, if you did, what numbers, and who showed them to you open?

A. I don't remember that I saw any open.

24 Re-X Q. Was what thread you saw there in boxes or packages like the boxes and paper packages of the nine dozen of Merrick's thread which have been produced by you here, or did you simply give the order without looking at any packages or boxes of thread?

A. I saw boxes and packages in stock like these, but did not examine them any further. I simply gave my order.

STEPHEN HAFF.

Sworn to before this 22d day of December, 1884.

THOMAS HUNT,
Notary Public.

Adjourned to January 13th, 1885, at 120 Broadway, 11 o'clock.

87 NEW YORK, *Jan. 13th*, 1885—11 a. m.

Examination adjourned to Jan. 15th, 1885, 11 a. m.

THOMAS HUNT,
Notary Public.

NEW YORK, *Jan'y 15th*, 1885—11 a. m.

Examination adjourned to Jan'y 16, 1885, 11 a. m.

THOMAS HUNT,
Notary Public.

NEW YORK, *Jan'y* 16, 1885.

Met pursuant to adjournment.

Present: Counsel as before.

HERBERT R. TAFT, a witness called on behalf of the complainant-, after being duly sworn to tell the truth, the whole truth, and nothing but the truth, deposes and says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?

A. My name is Herbert R. Taft; age, 34; Columbus, O.; travelling salesman for J. & P. Coats' Spool Company.

2 Q. How long have you been familiar with J. & P. Coats' spool cotton and with the form and design of labels and spool heads used for putting it up for sale on the market?

A. Well, I have only been in the employ of J. & P. Coats about nine months, but have sold Coats' cotton for a number of years, or have known of it.

3 Q. Please look at spool heads and labels on Schedule C, which are marked "Complainants' Exhibit 200-Yds. Spool Heads," and state if those show the design of spool heads and label of the J. & P. Coats' 200-Yds. spool cotton with which you have always been familiar.

88 A. Yes, sir.

4 Q. Please state what experience you have had in selling the J. & P. Coats cotton with said spool heads and labels, when and where it was that you sold it at retail, and in what portions of the country you have sold it since you have been travelling salesman for the firm.

A. I have sold it at retail in my father's store, in Columbus, who is now out of business, and at wholesale in the States of Ohio, Indiana, and Kentucky.

5 Q. What was your father's business?

A. Retail dry goods.

6 Q. State whether or not, according to your experience, the said J. & P. Coats' spool cotton is a popular kind and brand of spool cotton in the market and how it ranks with spool cotton of other manufacturers.

A. Well, I think it is as popular and ranks as high as any spool cotton made.

7 Q. Please look at the samples of spool heads and labels of the Merrick Thread Company on Schedule "G," marked "Complainants' Exhibit Defendants' 200-Yards Spool Heads," and state whether, in your business or traveling in selling spool cotton, you have seen in the market and on sale any spool cotton put up with such spool heads and labels.

A. I have in one instance only that I recollect of.

8 Q. Where was this Merrick spool cotton on sale when you saw it?

A. In Columbus, Ohio, at the store of Freeman, Staley & Morton.

9 Q. Please state whether or not the similarity between the spool heads and labels of Merrick Thread Company, shown on Schedule G, and those of Messrs. J. & P. Coats, as shown in Schedule C, is sufficiently close, in your judgment as a practical dealer in spool cotton, as to be likely to deceive ordinary retail customers giving the amount of care and attention to which such customers ordinarily do.

Objected to as leading.

A. I think it would in many instances.

89 10 Q. Have you known of any actual instance of the kind? If so, please state the circumstances.

A. I met one instance of that sort. While in the store of Freeman, Haley & Morton, Columbus, Ohio, talking to Mr. L. C. Freeman, a lady whom I am intimately acquainted with, Mrs. George Butler by name, knowing that I was selling J. & P. Coats' spool cotton, said that she had bought some of it in that store a few days previous and was surprised to find that it was not as good as it formerly had been. Knowing that this firm sold Merrick's thread

and did not sell Coats', I told her she was mistaken in the kind she got, and I got a spool of Merrick's from their cabinet, which, after looking at, she admitted was the sort she had purchased.

What the woman said objected to as hearsay.

11 Q. You say you got a spool of Merrick's and showed it to her. Did the spool of Merrick's that you showed to her have a spool head and label similar to those shown on Schedule G?

A. The same, I think.

Cross-examined by Mr. WITTER:

12 X Q. What was the number of the thread of the spool which you got and showed Mrs. Butler?

A. I cannot tell, sir.

13 X Q. It had the name of Merrick thread on it, had it not?

A. Yes, sir.

14 X Q. Where did this incident happen?

A. In the store of Freeman, Staley & Morton, Columbus, Ohio.

15 X Q. Were you in their employ at that time?

A. I was in the employ of Auchincloss Bros., agents for J. & P. Coats' spool cotton.

16 X Q. When was it?

A. Early in November, 1884.

90 17 X Q. How did you happen to be in the Columbus store at that time?

A. I was there on business; making a trip for the firm. I was making a trip to Columbus and dropped in socially.

18 X Q. Where did Mrs. Butler live?

A. In Columbus.

19 X Q. Are you related to her in any way?

A. No, sir.

20 X Q. How did you happen to enter the employ of Auchincloss Brothers?

A. They were needing a man, and I was recommended by a friend of Mr. Auchincloss, and he hired me. The gentleman's name was Albert Green, of the firm of Green & Joyce, of Columbus, Ohio, and 51 Leonard street, New York.

21 X Q. What is Mrs. Butler's Columbus address?

A. Her husband is of the firm of J. & G. Butler, wholesale grocers, Columbus, Ohio.

22 X Q. Coats' thread and the Willimantic and Clark's and Merrick's sell alike to the consumer at five cents a spool, do they not, as far as you know?

A. As far as I know, they do. I only know of Merrick's being sold at this one place.

23 X Q. Well, what do you mean by wholesale in your answer to Q. 4?

A. Well, I mean by that selling it to the people who sell it to the retailers.

24 X Q. And in what quantities?

A. In any amount over a hundred dozen at a time. We never ship less than one hundred dozen to one customer. I want to make a qualification of that. We never ship odd dozens; it must be over a hundred and a multiple of ten.

25 X Q. Describe a package of a hundred dozen such as it is the practice to ship of Coats' thread bearing the labels like the labels and marks on the spool heads of Schedule C.

Mr. Betts (counsel for complainant-) states that this is not proper cross-examination.

91 A. Well, I can't very well, the variety of packages is so large.

26 X Q. Do they contain threads of all numbers, from No. 8 to 200 thread?

A. Not in one hundred dozen packages.

27 X Q. Do the larger packages sometimes contain all the numbers from No. 8 to No. 200 bearing such labels and marks?

Counsel for the complainant- instructs the witness not to answer. This question is not proper cross-examination and is immaterial.

28 X Q. Do any of the packages contain such numbers so marked?

Same instructions.

29 X Q. You are familiar with the numbers of Coats' thread marked with the marks and labels on Schedule C, are you not?

A. I am, sir.

30 X Q. Name all of them.

A. Nos. 8, 10, 12, 16, 20, 24, 30, 36, 40, 46, 50, 60, 70, 80, 90, 100, 110, 120, 130, 140, 150, 200; that's all, sir.

31 X Q. Do you take orders for all these numbers?

A. Yes, sir.

32 X Q. For which numbers do you take the most orders?

A. Oh, I think Nos. 40, 50, and 60 are in excess of the others.

33 X Q. How does the quantity of such thread of numbers above No. 100 compare with the quantity of numbers below No. 100, approximately, so far as your experience as salesman for Auchincloss Bros. extends?

Same instructions.

92 34 X Q. Coats' thread that is sold at wholesale, and of all the numbers that you have referred to, from No. 8 to No. 200, is put up in boxes, one dozen in a box, is it not?

Same instructions.

35 X Q. Are you familiar with the manner in which the thread designated by said labels and marks and numbered from 8 to 200 are in fact put up?

Same instructions.

36 X Q. To whom in Ohio, Indiana, and Kentucky have you sold Coats' thread?

A. To the wholesale dry-goods trade principally.

37 X Q. Give the names of the customers.

A. I don't think I should like to do that without authority from the house to do it.

38 X Q. And do you decline?

A. I should rather ask the house first; there is a member of the firm sitting right here.

39 X Q. Please ask him for permission to give these names.

Counsel for complainant having consulted with Mr. Henry B. Auchincloss, who is now present, instructs witness on his behalf that Mr. Auchincloss has no objection to a statement by the witness of the names of a few prominent and well-known customers, sufficient to show the character of the dealing spoken of in the direct examination, but he insists that the defendants, being rival manufacturers and this suit being expressly brought to restrain their unlawful and unfair competition, they are not entitled, under the pretence of cross-examination, to pry into the details of names of customers or other similar matters which have no relevancy to this suit.

93 A. To Root & McBride Bros., Taylor, Kilpatrick & Co., Leek, Deering & Co., all of Cleveland, Ohio. To C. L. Luce & Co., E. C. Shaw & Co., Emerson & Co., all of Toledo, Ohio. To George De Wald & Co., Root & Co., Fort Wayne, Indiana. To Bamberger, Bloom & Co., Carter Bros. & Co., J. M. Robinson & Co., Davies, & Mallory Co., Louisville, Kentucky. I can give you some other names if you want them. Geo. W. McAlpine & Co., Lewis, Stix & Co., Cincinnati, Ohio, and more if you want them.

40 X Q. In answer to Q. 10, in relating the Butler incident, you say you took a spool of Merrick's thread from their cabinet. What do you mean by their cabinet?

A. I mean the cabinet of Merrick's spool cotton, owned by Meeman, Staley & Morton, in their store.

41 X Q. You mean the cabinet in which the Merrick thread was kept, do you?

A. Why certainly; and with the Merrick advertisement on the outside of it.

42 X Q. The name Merrick was conspicuous on the outside of the cabinet, was it not?

A. I can't say. I don't remember as to that.

43 X Q. What do you mean by the advertisement?

A. My recollection is that there was something on the drawers of it which designated it as Merrick's thread.

44 X Q. Is it not your best recollection that it was the word Merrick which so designated it?

A. I don't remember whether the word Merrick was on the front of the cabinet or not. It was the only one I have ever seen.

45 X Q. Can you think of anything else on there that would designate it as Merrick's thread?

A. No, sir; I don't remember anything. I remember the color of the cabinet, it being impressed upon me as the only thread cabinet of that color.

H. R. TAFT.

Sworn to before me—

THOMAS HUNT,
Notary Public.

Adjourned until 2 o'clock p. m.

94 NEW YORK, *January* 16, 1885.

Met pursuant to adjournment.
Present: Counsel as before.

HENRY B. AUCHINCLOSS, a witness called on behalf of the complainant-, after being sworn to tell the truth, the whole truth, deposes and says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?
A. Henry B. Auchincloss; age, 48; New York city; commission merchant.
2 Q. Are you one of the firm of Auchincloss Bróthers, New York agents for the sale of the complainants' thread or spool cotton?
A. I am.
3 Q. How long have you been familiar with the complainants' thread or spool cotton as an article of trade and merchandise, and how long have you been one of the agents for the sale of the same in this country?
A. Since 1851. Partner since 1857.
4 Q. State whether or not you are familiar with all the leading styles, brands, and manufacturers of spool cotton whose goods are on sale in the United States; and, if so, how long you have been familiar with the same.
A. I am; since 1857.
5 Q. Do you know The Merrick Thread Co., the defendant, and the styles of thread or spool cotton manufactured and put upon the market by it; and, if so, how have you become acquainted therewith and how long have you known it?
A. I do. Well, I don't remember when I first became acquainted with it. It has been on the market some time.
6 Q. State whether or not the firm of J. & P. Coats cause
95 any of their spool cotton to be manufactured in the United States; and, if so, where and by and through whom?
A. Pawtucket, R. I., by the Conant Thread Company.
7 Q. What is the interest or connection of the firm of J. & P. Coats in the Conant Thread Co.?
A. Owners of the majority of the stock.
8 Q. State whether the thread of the complainant- is sold else-

where than in the United States; and, if so, generally to what extent, whether largely or otherwise.

Objected to as immaterial.

A. It is sold largely all over the world.

9 Q. State what the reputation and standing of the thread of the complainants is as compared with other manufacturers of thread.

Objected to as indefinite and immaterial.

A. First-class.

10 Q. State whether you are familiar with the quality of the thread or spool cotton of other leading manufacturers whose goods are on sale in the United States; and, if so, how the thread of the complainants compares therewith as to quality, character, and excellence.

A. I am familiar. I have been in the habit of testing all threads for quality from time to time for the last twenty-five years. I believe the thread of the complainants to be the best made.

11 Q. State whether or not the complainants' thread, by reason of the matters stated by you above, has earned any reputation in the United States and elsewhere and whether or not the names and designs and trade-marks of the said thread are regarded by the trade as an assurance of good quality.

Objected to as leading and as immaterial.

93 A. It is within my own knowledge that the complainants' thread has a high reputation in the United States, and that their name, design, and trade-mark are regarded by the trade as an assurance of good quality.

12 Q. State what is meant by the term "six-cord thread," and whether the same is manufactured or sold in this country by the complainants. If so, state in what different lengths such thread is wound on spools and what numbers and sizes thereof are made and sold. Produce illustrative samples of the spools of six-cord thread, with the labels, marks, and designs used upon the same.

A. Six-cord thread is six strands twisted together.

In 200 yards, Nos. 8, 10, 12, 16, 20, 24, 30, 36, 40, 46, 50, 60, 70, 80, 90, 100.

In 500 yards, same numbers.

In 1,200 yards, all these numbers can be wound, but the coarser numbers—8, 10, 12, 16—have not been wound, to my recollection, on 1,200-yards lengths.

In 2,400 yards, 30, 40, 50, 70, 80, 90, 100, all numbers, can be wound. I produce samples of all the above.

They are offered in evidence and marked "Exhibits Coats' Samples, Nos. 1 to 67."

13 Q. State how long the complainants have been manufacturing and selling the six-cord thread, illustrative samples of which you have produced.

A. Nos. 8, 10, 12, 16, 20, 24, 30, 36, 40, since the year 1840 or 1842; Nos. 46, 50, 60, 70, 80, 90, 100, since the war of the rebellion—since the end of the war of the rebellion—certainly since 1865.

14 Q. State whether all of the six-cord thread manufactured and sold by the complainants bears the words upon the label "best six cord;" and, if so, whether any other manufacturers, to your knowledge, have, prior to the complainants' adoption and use of said words, ever adopted and used the same.

Objected to as immaterial and indefinite.

97 A. Yes. I have no knowledge of any prior use of said words.

15 Q. State whether the complainants also manufacture three-cord thread and whether the same has become known to the trade generally by any peculiar marks, designs, and character of spools; and, if so, produce samples showing the same and state how long such marks, designs, and character of spools have been adopted and used by the complainant.

A. They do. They manufacture three-cord thread for the under thread of sewing machines, Nos. 40, 50, 60, 70, 80, 90, 100, branded J. & P. Coats' three-cord under thread and ticketed and wound only on 1,200 and 2,400 yard lengths. They also manufacture, for cambric embroidery and fine sewing, three-cord thread Nos. 110, 120, 130, 140, 150, 200, ticketed "best spool cotton," wound on 200-yard spools. I produce samples of all of the above.

They are offered in evidence and marked "Coats' 3-cord samples, numbers 1 to 20."

16 Q. State whether the six-cord thread of the complainants, wound in lengths of 200 yards, has become known and recognized by the trade in the United States by any peculiar marks, designs, labels, names, and character of spool; and, if so, what such marks, designs, labels, and character have been and are and how long the complainants have been in the enjoyment and use of such trade-marks, designs, labels, and character of spool.

A. The six-cord threads have been known and recognized by the trade in the United States by labels, designs, &c., as shown on Schedule C. The tickets have been in use for forty-two years. The complainants have enjoyed the use of the trade-marks embossed on the spools since their introduction, subsequent to 1870, except so far as interfered with by the defendant-.

Answer objected to as incompetent.

98 17 Q. State whether prior to the adoption by the complainants of any such marks, labels, designs, and character of spools any marks, designs, labels, and spools had been used by any other parties which were so nearly similar as to be likely to be mistaken for them.

Objected to as immaterial and incompetent.

A. None had been used.

18 Q State whether the use of the black and gold label of the complainants in connection with the embossed numerals on the edge of the natural wood of the spool gives to the complainants' spools any distinctive appearance or design by which the complainants' spools can be readily recognized from those of other manufacturers.

Objected to as leading.

A. It does.

19 Q. If you are familiar with the different styles of thread or spool cotton put upon the market by the defendants The Merrick Thread Company please produce samples of each kind—to wit, of the defendants' three-cord spool cotton on their spools and of their six-cord spool cotton on their spools of 200 yards' length and of their six-cord spool cotton on their spools of more than 200 yards' length.

A. I produce samples of Merrick's six-cord thread, 200 yards, Nos. 30, 40, 50, 70 black, and Nos. 40, 50, 60, 70 white.

Three-cord, Nos. 36, 50, 70 black, and No. 60 white. Of 500-yards spools I produce Nos 36 and 40 black.

Question and answer objected to except as they have reference to six-cord spool cotton on spools for 200 yards' length.

20 Q. State whether the thread of the defendants The Merrick Thread Company is of superior, equal, or inferior quality as
99 compared with that of the complainants, and of superior, equal, or inferior reputation in the trade.

Objected to as incompetent.

A. I consider it inferior in quality and reputation. It sells at five per cent. lower price in 200-yards spools.

21 Q. State, if you know, whether the defendant Herbert F. Palmer, New York agent of the defendant The Merrick Thread Company, sells any or all of the above kinds of thread on the said spools of the defendant company.

A. To the best of my knowledge and belief, he does.

22 Q. State whether or not the defendant The Merrick Thread Company comes into competition with the complainants on any class of their goods except the six-cord thread.

Objected to as immaterial.

A. Only in three-cord thread of the longer lengths.

23 Q. State whether or not the Merrick Thread Company come into competition with the complainants in selling their six-cord thread.

A. They do.

24 Q. What do you mean by "longer lengths" in your twenty-second answer?

A. Longer than 200 yards.

25 Q. State whether or not the defendants The Merrick Thread Co. by their sale of six-cord thread with the kind of spools used by

them to designate that thread interfere in any way with the trade of the complainants in corresponding spool cotton.

Objected to as indefinite.

A. From my own knowledge, from the reports of travelers, salesmen, and customers, I believe that the Merrick Thread Co.
100 interferes with the complainants' trade by selling thread with trade-marks similar to those of the complainants.

26 Q. State whether or not, from your experience as a practical salesman of thread or spool cotton, the six-cord thread of the defendant The Merrick Thread Co., when put up upon spools with the designs and labels shown on the samples you have produced of their manufacture, would be likely to deceive ordinary retail purchasers or customers of spool cotton into supposing that the said thread was the thread of the complainants, and give your reasons for any opinion you may express.

Objected to as indefinite and as incompetent.

A. They would, decidedly, on account of the similarity.

27 Q. Please give the details of similarity which, in your opinion, would be likely to deceive ordinary retail customers.

A. The knarling or embossed designs are almost exact copies of those of J. & P. Coats; that's all.

28 Q. State what facts and circumstances are within your knowledge that lead you to believe that the labels and designs of spool heads adopted by the defendant The Merrick Thread Co. were so adopted for the purpose of deceiving the public into believing that the thread manufactured and sold by them was in reality the thread of complainant.

Objected to as leading and incompetent.

A. Well, several reasons: First, that they formerly used a different design; second, that in 1878 the Merrick Company wrote to Mr. H. Conant inquiring where they could obtain dies like those used by J. & P. Coats. I can produce that letter and the correspondence. Third, when their attention and that of other parties copying the same designs for trade-mark was drawn to the similarity of these designs to those of J. & P. Coats, they alone continued their
101 use; fourth, that Mr. Merrick was many years ago engaged with other parties copying J. & P. Coats' trade marks, from which they were restrained by injunction.

29 Q. State when you first heard of the putting upon the market of any of the six-cord thread of the defendants The Merrick Thread Co. with the present label and design and the embossment on the same.

A. July, 1879.

30 Q. State when the Merrick Thread Co. first to your knowledge imitated or attempted to imitate any of the spools or designs for spool cotton of the complainants, and whether they were notified of

such fact, and, if so, by whom, and whether they at that time discontinued such imitation, so far as you know.

Objected to as leading.

A. July, 1879. Notified by Messrs. Varnum & Harrison, counsel for J. & P. Coats, August, 1879. I am not sure if they discontinued it; my attention was not called to it again until 1883.

31 Q. You spoke, in answer to the 27th Q., of the similarity between the Merrick thread and that of J. & P. Coats in respect to the knarling or embossed designs. In your opinion, is there any similarity between the paper labels of the Merrick Thread Company's six-cord 200-yard spools and those of J. & P. Coats which would be likely to deceive ordinary retail customers?

Objected to as leading.

A. There is. Both labels are black and gold. There are differences in arrangement, but a general similarity.

32 Q. What have you to say as to the fact that on both spools these labels are combined with the embossed spool heads bearing the numerals of the cotton on the spool?

Objected to as leading.

102 A. There is such general similarity as to cause one to be mistaken for the other in the hands of the ignorant.

Seasonable objection is here made to all questions and answers in this deposition tending to show an infringement by the defendants of any right or claim of complainants other than that upon the alleged trade-mark referred to in the 5th, 6th, and 7th paragraphs of the bill of complaint, and especially set forth in the 6th paragraph thereof.

Adjourned to Wednesday, 21st inst., at 11 o'clock.

JANUARY 21ST, 1885—11 a. m.

Parties met pursuant to adjournment.
Present: Counsel as before.

Examination of Mr. AUCHINCLOSS by Mr. BETTS continued:

33 Q. I notice, in answer to the 27th question, that you terminated your answer by the words "That's all." Please state what you meant by those words.

A. It was in response to an inquiry of the person who was taking down the evidence, and did not relate to the evidence.

34 Q. What was the inquiry of the person who was taking down the evidence which led you to make the remark?

A. I don't hear distinctly. The man looked up and I understood him to want to know whether that was all.

35 Q. In answer to Q. 28 you gave several reasons which led you to believe that the similarity of designs and marks adopted by the

Merrick Thread Company were so adopted for the purpose of
103 deceiving the public into believing that their thread was the thread of the Messrs. Coats. Can you mention any additional reason beside those specified in your answer; if so, what?

Objected to as leading.

A. Yes. Their tickets on three-cord thread, in which they do not come into competition with J. & P. Coats, are entirely different from those on the six-cord thread. There is no "knarling" or embossing on the spools of three-cord thread. Similarity to which I have testified occurs only on spools of six-cord thread of 200-yard lengths, in which they come into competition with J. & P. Coats.

Thus far this answer refers only to the 200-yard lengths, containing a combination of tickets and knarling. On the longer length spools the Merrick Thread Company formerly used a ticket without knarling. J. & P. Coats have never used a ticket on spools longer than 200 yards.

36 Q. You spoke of the fact that the Merrick Thread Company formerly used a ticket without any knarling on their spools of longer length than 200 yards, and that J. & P. Coats never used a ticket on their spools of longer length than 200 yards. Please produce, if you can, a sample of the spool head and ticket formerly used by the Merrick Thread Company on their long-length spools, and then state what similarity there is between the J. & P. Coats long-length spools and the corresponding spools of the Merrick Thread Company, as more lately used.

Objected to as leading.

A. I produce sample of the spool head and ticket No. 50, best 6-cord.

The similarity consists in the thread subsequently sold in the numbers embossed upon the spools.

37 Q. You did not say what the sample spool head and ticket No. 50, produced, was and who used it, and for what kind
104 and lengths of thread. Please state what the fact is.

Same objection.

A. The ticket reads, "The Merrick Thread Company Best Six-Cord, 2,400 Yds."

38 Q. (Question repeated.)

A. Used by the Merrick Thread Company, so far as I know, for that number and that length of thread.

Sample spool head is offered in evidence and marked Exhibit "Merrick First Long-Length Spool Head."

105 HENRY B. AUCHINCLOSS being cross-examined by Mr. WITTER, counsel for defendants:

39 X Q. Are you interested in any other way with the complain-

ants than as you state in answer to Q. 2, as New York agent for them with the other members of your firm?

A. I am not.

40 X Q. Are you stockholder or otherwise interested in the Conant Thread Company, or is any other member of your firm?

A. I am not and no member of my firm.

41 X Q. Does the agency of your company extend throughout the United States or is it limited to New York?

A. General supervision of the United States—headquarters, New York.

42 X Q. In answer to 4 Q. you state that since 1857 you have been familiar with all the leading styles, brands, and manufacturers of spool cotton whose goods have been on sale in the United States. Name these principal manufacturers.

A. J. & P. Coats, George A. Clark & Bro., representing the Clark Thread Company; John Clark, Jr., & Co., now Clark Mile-End Company; Willimantic Linen Company, Merrick Thread Company, Jonas Brook & Bro., Melthenay Mills, Orrs & McNaught, Green & Daniels.

Adjourned to 2 p. m.

2 P. M.

43 X Q. Green & Daniels do not make or sell much, if any, spool thread now, do they?

A. No.

44 X Q. What do you mean by the words "Meltham
106 mills"? Is that the place of manufacture of Jonas Brook & Bro.?

A. It is their place of manufacture in England.

45 X Q. Jonas Brook & Bro. do not manufacture thread in this country, do they?

A. They do not.

46 X Q. How long have you been familiar with the black and gold label appearing on one end of the spool of thread marked "Defendants' Exhibit No. 2, Geo. A. Clark, No. 50 Thread"?

Objected as not proper cross-examination. Objection subsequently overruled by Judge Wallace.

A. About twenty years or longer.

47 X Q. How much longer do you think that label has been used on that thread in this country, judging from your understanding of the facts?

Same objection, and witness is instructed not to answer for that reason; also because the question calls for a mere guess or guesses.

Witness declines to answer under instructions. (Objection subsequently sustained by Judge Wallace.)

48 X Q. How much longer than twenty years are you willing to say that said label was used on said thread?

Same objection and instruction.

A. Same answer.

Objection subsequently overruled by the court.

50 X Q. You find the name of the maker, the words "best six, cord," the words "200 yards," and the number of the thread, to wit-50, on that black and gold label, do you not?

A. I do.

107 51 X Q. What is "best six-cord" understood to mean on said label?

Same objection and instruction.

A. Same.

Objection subsequently overruled by the court.

52 X Q. What are the words "200 yards" understood to mean on that label?

Same objection and instruction.

A. Same.

Objection subsequently sustained by the court.

53 X Q. What are the figures "50" understood to mean on that label?

Same objection and instruction.

A. Same.

Objection sustained by court.

54 X Q. Do you understand that the words "best six cord," "200 yards," and "50" mean anything different from what they do when they appear upon the corresponding spool of J. & P. Coats' thread?

Same objection and instruction.

A. Same.

Objection sustained by court.

55 X Q. The maker of that Clark's thread can be ascertained by the name on the black and gold label, can it not?

Objected to as immaterial.

108 A. Not necessarily. It is made by the Clark Thread Company.

56 X Q. And that is the label the Clark Thread Co. use, is it not, on their thread?

A. Yes.

57 X Q. What did you mean by "not necessarily" in your answer to X Q. 55?

A. You asked who was the maker. To be exact, the Clark Thread Co. are the makers. Geo. A. Clark is dead.

58 X Q. How long have you been familiar with the black and

gold label appearing on one end of the spool of thread marked "Defendants' Exhibit No. 1, Willimantic No. 50 Thread"?

Objected to as immaterial and not proper cross-examination.

A. As long as they have made it; probably twenty years.

Objection subsequently overruled by court.

59 X Q. How long have you been familiar with the label of black, gold, and silver appearing on one end of the spool of thread marked "Defendants' Exhibit No. 3, John Clark, Jr., & Co.'s No. 59 Thread"?

Same objection.

A. Since 1851. I think the words "for hand and machine sewing" have been put in since I first became acquainted with it; when, I don't know.

Objection subsequently overruled by court.

60 X Q. How long have you been familiar with the black and gold label appearing on one end of the spool of thread now handed you?

Same objection.

109 A. Since 1855 or 1856. It is out of market now.

Objection subsequently overruled by court.

61 X Q. When did this thread go out of market, as you understand it, and how long did it remain upon the market, as near as you can state?

Objected to as immaterial and not cross-examination, and instructs witness not to answer.

A. Witness declines to answer.

Objection subsequently overruled by court.

Defendants' counsel puts the said spool of cotton in evidence, and it is marked "Defendants' Exhibit No. 6, Orrs & Macnaught No. 40 Thread."

62 X Q. In answer to Q. 28 you say that the Merrick Thread Co. formerly used a different design. Please explain what you mean by that.

A. Until the new labels and designs of spool heads adopted by the Merrick Thread Co. for six-cord thread similar to those of J. & P. Coats appeared, the only labels and designs known to me were those still used upon three-cord thread, 200-yard lengths.

63 X Q. The maker of the thread on spools "Defendants' Exhibits 1, 3, 4, 5, and 6" are ascertainable by the name on the black and gold label on one end of the spool, are they not?

Objected to as immaterial and as calling for the witness' —.

A. They are presumed to be.

64 X Q. What are the words 200 yards, appearing——

110 Witness here states that in answer to the previous question he wishes to add that they are presumed to be when closely examined.

on all of these spools of thread, "Defendants' Exhibits 1, 2, 3, 4, 5, and 6," put there for?

Objected to as calling for the opinion of the witness and as immaterial and irrelevant.

A. To show the length.

65 X Q. And what are the numbers 40 or 50 on the said six exhibits put on them for?

Same objections.

A. To show the size of the thread.

66 X Q And what are the words "best six-cord" on Defendants' Exhibit- 2, 4, 5, and 6 put there for?

Same objections.

A. Presumably in all cases as I know it to be in the case of J. & P. Coats, it is to represent the number of strands—the quality of the thread.

67 X Q. The words "superior six-cord" on the other end of spool No. 1 is put there for the same purpose, is it not?

Same objection.

A. I have no means of knowing the intention of the Willimantic Co.

68 X Q. How as to the words six-cord cable thread on spool Defendants' Exhibit No. 3; that is presumed to represent the number of strands—the quality of the thread—is it not?

Same objection.

A. It is presumed to. I have no individual knowledge of their intention.

111 69 X Q. That is what these words mean to the world at large, is it not? I mean those words on all these exhibits, from 1 to 6.

Same objection.

A. To the world at large, the words 200 yards are presumed to show the length. Nos. 40 and 50, the numbers on the label, are presumed to show the size of the thread; the words "best six-cord" or "six-cord cable" are presumed to show the quality. In the case of J. & P. Coats, in which alone I have personal knowledge, the numbers embossed upon the spool heads were placed there for a specific object, namely, to preserve the numbers when the labels are defaced by the spindle of the sewing machine.

70 X Q. J. & P. Coats for their six-cord thread, for their 200-yard spools, Nos. 8 to 100, inclusive, and for their 200-yard spools of what you say is three-cord thread, from Nos. 110 to 200, use boxes each containing a dozen spools, both the boxes and the labels on the tops of the boxes being each respectively smaller in size from No. 8 to No. 200, both inclusive. Is not that true?

A. From 8 to 120; yes.

71 X Q. And in all of these boxes and labels from 8 to 200, inclusive, the size of the label is adapted to the size of the box, is it not?

A. From 8 to 120; yes.

72 X Q. Will you please look at the box of Coats' thread marked "Coats' 1-cord samples, number 15, T. H., sp. ex.," and state whether the label on that particular box is not too small for the box lengthwise of the box, and in making your answer compare the extent to which the labels cover the box in the other boxes, and compare the said 110 box, as to its label, with the size of the label on another box of 110 Coats' thread which I now hand you and which latter is marked for identification "Defendants' Exhibit No. 7, Number 110 Coats'."

Objected to as immaterial and not cross-examination.

112 A. Some mistake of the box-maker.

Objections subsequently overruled by court.

73 X Q. Will you please answer the question (X Q. 17)?

A. The label on "Defendants' Exhibit No. 7" appears to be from some old edition of box labels, quite different from the one used of Exhibit 15. I can't explain it. The color of the paper of the labels is different, showing that they are two different editions.

74 X Q. Look at the labels on the top of boxes of Coats' thread, marked "Coats' three-cord samples, Nos. 15 and 16" respectively, and containing number 110 and 120 thread, and state whether the labels on the tops of those two boxes are not exactly the same size every way.

Objected to as immaterial.

A. They are the same,

75 X Q. State whether the label on "Defendants' Exhibit No. 7," on the top of the box and containing No. 110 thread, is not of a size between the labels on top of boxes marked "Coats' 6-cord samples, number 14," and "Coats' 3-cord samples, number 16," containing numbers 100 and 120 thread respectively?

Objected to as immaterial and not proper cross-examination.

A. Yes.

Objection subsequently overruled by court.

76 X Q. The boxes of thread produced as exhibits by complainant, and containing numbers 80, 90, 100, 120, and 130, 200-card

spools, with "Defendants' Exhibit No. 7," containing No. 110 thread, have upon their tops labels which form a regularly graduated series as to size, do they not?

Same objection.

113 A. They do.

Objection subsequently overruled by court.

77 X Q. But the labels upon said boxes containing numbers 80, 90, 100, 120, 130 do not, with Coats' 3-cord samples No. 15, containing number 110 thread, form a regularly graduated series as to size, do they?

Same objection.

A. No.

Objection subsequently overruled by court.

78 X Q. State whether the label on numbers 80, 90, 100, 120, and 130 on the complainants' exhibits, being numbers 12, 13, 14, 16, and 17, are the usual labels for the tops of such boxes of thread, referring to the size.

A. So far as I can recognize them, they are.

79 X Q. The label on the top of box containing 110 thread and marked "Coats' 3-cord samples number 15" bears the words, in large capital letters lengthwise of the box, over the lion and the eagle, "Best sewing cotton for hand and machine," and Defendants' Exhibit Number 7, containing No. 110 thread, bears in the same place the words best six-cord cotton for hand and machine. Is not that so?

A. Yes.

Adjourned to January 22d, at 11 o'clock.

114 THURSDAY, *Jan. 22d*, 1885—11 a. m.

Parties met pursuant to adjournment.

Present: Counsel as before.

Cross-examination of Mr. AUCHINCLOSS by Mr. WITTER continued:

Witness says he desires to add to his last answer:

"Defendants' Exhibit No. 7" contains J. and P. Coats' 110 three-cord spool cotton ticketed on the spool "best spool cotton." The reason why it is contained in a box "best six-cord cotton for hand and machine" is as follows: When J. & P. Coats first made No. 100 thread six-cord it was made from No. 180 yarn and so continued for several years. After it was advertised that all J. & P. Coats' thread was six-cord from No. 8 to 100 sundry competitors made their thread six-cord from 8 to 100, but used 160 yarn for No. 100 thread. There was no graduated standard for sizing six-cord threads as there had been for three-cord. Each manufacturer adopted a

system of sizing to suit himself. In numbers finer than 50 thread it was found that the sizing of competitors of J. & P. Coats was generally coarser than the sizing used by J. & P. Coats, and that the effect was to make their corresponding numbers appear coarser and stronger than those of J. & P. Coats. A graduated system of sizing was finally adopted by J. & P. Coats rising 10 points in yarn for each number of thread from number 24 thread, which was made from number 50 yarn, as follows:

Thread Nos.,	24,	30,	36,	40,	46,	50,	60.
Yarn Nos.,	50,	60,	70,	80,	90,	100,	110.
Thread Nos.,	70,	80,	90,	100.			
Yarn Nos.,	120,	130,	140,	150.			

It was thought best to adopt a scale that would never require to be altered. This scale has been used ever since and is satisfactory to the public.

115 Now, as the number 100 six-cord thread has been made from 180 yarn, the change to 150 yarn made a great gap between Nos. 100 and 110 thread.

It was an open question whether a six-cord thread made from 180 yarn was not demanded by the public. To test this question and not to disappoint those who had been in the habit of using No. 100 thread made from 180 yarn, I suggested to Messrs. J. & P. Coats that they should make number 110 thread, of six-cord, from number 180 yarn, but not ticketed six cord. This advice was acted upon, and for several years the number 110 thread was made six-cord, but ticketed on the spool "best spool cotton." The expectation was that if a thread made six-cord from 180 yarn was really wanted by the public, the demand would be turned quietly from No. 100 thread made of 180 yarn to No. 110 thread made of the same yarn. It was never advertised as "six-cord," and no attempt was made to sell it as six cord, the idea being to let consumers decide the matter for themselves and ascertain the true wants of the public. This expectation was not realized, the reason being that the fine numbers above 100 are wanted for embroidering on cambric and similar fine fabrics, softness rather than strength being required. Six-cord thread is too hard-twisted. The demand for 110 while it was six-cord fell off instead of increasing. It was transferred to the next numeer, 120, which was three-cord. Ample time was given te test this question—certainly five years; I cannot recall the exact time—and when it was decided as above, the thread was changed back to three-cord. When this change was made no alteration in tickets was required and no particular attention was called to the style of the boxes. This change back to three-cord was recent—within two years. The sample "Defendants' Exhibit No. 7," is put up in a box used when the thread was really six-cord. The sample submitted on behalf of complainant- evidently has a number 120 label. It is a matter of no significance whatever.

77½ X Q. What numbers of yarn were and are the other
116 numbers of thread made from, to wit, numbers 8 to 24 thread and 110 to 200 thread?

A. Thread numbers, 8, 10, 12, 16, 20; yarn numbers, 32, 36, 40, 42, 46, with the other numbers already given, make a graduated scale from number 8 to 100 six-cord, differing in each number, which is not the case, so far as I know, with any other thread.

I decline to give the yarn numbers for three-cord thread, as not pertinent to the suit.

Complaint has been made of copying J. & P. Coats' trade-mark on two-hundred-yard thread only in numbers eight to one hundred.

78½ X Q. Won't you give the information asked for and let the court judge of the pertinency of it?

Objected to as immaterial, and the witness is instructed that the counsel for the complainant sees no pertinency to the question, and that he is at liberty to decline to answer immaterial inquiries as to the details of his own business or that of the complainant-.

A. I decline.

Objections subsequently overruled by court.

79½ X Q. There is a large amount of number 110 three-cord J. & P. Coats' thread on two-hundred-yard spools in the hands of the trade in this country, the top label upon the boxes containing which bears the words "best six-cord cotton" and best six-cord spool cotton. Is not that so?

Objected to as not cross-examination.

A. It is not so; the sale of No. 110 thread is very small.

80 X Q. I mean a large amount in proportion to the total amount of that number which is sold by you?

Objected to as not cross-examination, and witness is in-
117 structed that he may decline to make any guess or give any information at this time on the subject.

A. I decline to add anything to answer to X Q. 79½.

Objection subsequently overruled by court.

81 X Q. And you decline to answer the last question, do you?

Same instruction.

A. Certainly.

Objection subsequently overruled by court.

82 X Q. When, if ever, did J. & P. Coats or the Conant Thread Co. or you or your firm first begin to put 120 label on the top of 110 box, as appears in "Coats 3-cord samples number 15"?

Same instruction.

A. I don't know.

83 X Q. Is that their custom now?

Same objection and instruction.

A. I don't know; I just happened to pick it up; that is all I know about it. Both kinds were in our stock. I presume, but do not know, that the Conant Co. are using that now. By that I mean 120 label on 110 box. I shall send all 110 with "best six-cord" to be relabeled "best sewing cotton," as there is no intention of selling it as six-cord thread.

Objection subsequently overruled by court.

84 X Q. Have you heretofore ordered any to be so relabeled?

Same objection and instruction.

118 A. No answer.

Objection subsequently overruled by court.

85 X Q. Will you now please look at the box containing number 90, 200 yards six-cord thread, marked "Coats' 6-cord samples number 13," and state whether the words "best six-cord" appear twice upon the top label of the box.

A. They do.

86 X Q. And the same words likewise appear twice on the bottom label of said exhibit, do they not?

A. They do.

87 X Q. And within the box the dozen of spools of thread are covered by a paper flap bearing in very large letters the words "best six-cord spool cotton, white and black, 8 to 200," together with other words, and, moreover, the words "best six-cord spool cotton" in smaller letters in another place, are they not?

A. They are.

88 X Q. The answers to X Q.'s 85, 86, and 87 are all true with reference to numbers 8 to 80, inclusive, of the same goods, are they not?

A. I presume they are all the same. The fly-leaf in the boxes is a general advertisement of the numbers and colors kept in stock, so understood by dealers, and not in any sense intended as a claim that numbers above 100 are six-cord. Staple shades are quoted from 30 to 80; fancy shades, from 40 to 60; brown and assorted colors, from 8 to 100; white and black, from 8 to 200 It is an advertisement to dealers that those numbers are kept in stock.

All after the first sentence of this answer is objected to as not called for by the question and as voluntary testimony.

89 X Q. Will you now look at the "Defendants' Exhibit No. 7" and state whether marks and advertisements referred to in X Q.'s 85, 86, and 87 are not the same in all respects, except as to
119 the inside paper flap, as those which appear on the boxes containing numbers 8 to 100.

A. They are.

90 X Q. And all the boxes from 20 to 200, inclusive, containing 200-yard spools of thread are marked twice on the label upon the bottom of the box, "best six-cord spool cotton," are they not?

A. They are.

91 X Q. In the advertisement which I hand you, numbers 8 to 200 of said thread is advertised as Best Six-Cord, is it not?

Objected to as not cross-examination.

A. The paper is an assortment list of 1883 of Auchincloss Brothers. It is well understood in the trade that the threads are six-cord from No. 8 to 100, and are three-cord from No. 110 to 200. It makes no special claim; only one assortment on the paper contains any thread above 100, and that assortment contains only two dozen each of 110, 120, 130, 140, 150. There is no occasion of making any special exception of those.

Objection subsequently overruled by court.

Defendants' counsel offers the said advertisement in evidence, and it is marked "Defendants' Exhibit Coats' 1883 Advertisement."

Objected to as incompetent and immaterial.

92 X Q. I now hand you a little book and ask you whether that is not an advertisement of Nos. 8 to 200 of 200-yard spool cotton as best six-cord, especially on page six thereof?

Same objection.

A. I have seen it before. The idea never occurred to me as representing the finer numbers above 100 as six-cord; the book does not go to consumers, but only to dealers, who are well aware
120 that J. & P. Coats only claim to make their thread six-cord from number 8 to 100.

Defendants' counsel puts the said little book in evidence, and it is marked "Defendants' Exhibit No. 9, Coats' 1884 Advertisement."

Objected to as incompetent and irrelevant.

93 X Q. Your firm bills to its customers Nos. 8 to 200 thread on 200-yard spools as "best six-cord" without distinction of number, does it not?

Same objection.

A. Produce a bill-head.

94 X Q. Will you produce a bill-head at the next session?

Same objection.

A. Certainly, if it is desired.

95 X Q. Please produce a copy of a bill of sale of such numbers of such thread taken at random, and produce also a blank bill-head at the next session.

Same objection.

A. I will.

96 X Q. A uniform price is charged and received by you, as agent of J. & P. Coats, for all 200-yards Coats' spool cotton from numbers 8 to 200, and whether black or white? By uniform price I mean the same price per dozen for one number as for another.

Objected to as immaterial.

A. It is.

97 X Q. And a much lower and uniform price is charged for a like number of yards of what is labeled and advertised as Coats' three-cord thread, being wound on spools containing more than 200 yards, to wit, 1,200 and 2,400 yards, as I understand it?

A. It is.

121 98 X Q. Are there any differences between the designations on the spools themselves containing 200 yards of numbers 8 to 100, inclusive, and numbers 110 to 200, inclusive, Coats' thread, except that numbers 8 to 100, inclusive, have the numeral embossed in the wood, while 100 to 200 do not, and 8 to 100 have the words "six cord," while 110 to 200 have the words "spool cotton" in the same place and a different number on each end?

A. Yes. Numbers 8 to 100 have lines and stars. Some have lines and some have stars, forming the arbitrary symbol claimed by J. & P. Coats as part of their trade-mark for six-cord thread. The numbers 110 to 200 have no such marks—stars or lines.

99 X Q. Can you mention any other difference?

A. I see no other difference.

100 X Q. Numbers 110 to 200 have an embossed border, varying in design, about the label, have they not?

A. They have.

Adjourned to Friday, January 23, at 11 o'clock.

Met pursuant to adjournment.

Present: Counsel as before.

Cross-examination of witness HENRY AUCHINCLOSS continued by Mr. WITTER:

101 X Q. When did J. & P. Coats first advertise that "all J. & P. Coats' thread was six-cord, from No. 8 to 100," as referred to by you in your addition to your 76th answer in the following language: "After it was advertised that all J. & P. Coats' thread was six-cord, from No. 8 to 100, sundry competitors," &c.?

A. I cannot recollect the precise date. It was between 1867 and 1870, to the best of my recollection.

122 102 X Q When was that notification changed so as to embrace the whole line of 200-yard numbers, from number 8 to 200, substantially as the advertisements now appear?

A. Never changed. No such notification was ever made.

103 X Q. Won't you explain your last answer, for it seems to me that the label on the top of "Defendants' Exhibit No. 7," the label on the bottom of your 110 to 200 thread, on 200-yard spools, the

flap inside the boxes of the lower number of 200-yard thread—namely, 8 to 100—the exhibits "Defendants' Exhibit No. 8, Coats' 1883 Advertisement," "Defendants' Exhibit No. 9, Coats' 1884 Advertisement," and also your bill-heads are a notification to the public that your white thread from numbers 8 to 200 and your black thread from numbers 8 to 150 or higher is six-cord thread?

A. J. & P. Coats' reputation has been made by their six-cord thread, from No. 8 to 100. No other numbers have been ticketed "six-cord." It has been so widely understood by dealers and the public that their thread was six-cord from 8 to 100 and not six-cord in numbers above 100 that no distinction between them in the advertisements was deemed necessary. I have explained in answer to X Q. 76 how it occurred that the label on the top of Defendants' Exhibit No. 7 should have been six-cord. I have explained that the flap inside the boxes of the lower numbers of 200-yard thread—namely, 8 to 100—has been used as an advertisement of the general stock of thread, and I should further explain that the label on the bottom of the boxes is an advertisement of their "best six-cord spool cotton for hand and machine sewing," with a statement of the medals awarded to J. & P. Coats, in no way intended to claim that any numbers of thread are six-cord which are not so ticketed on the spools. Our advertisements in "Defendants' Exhibit No. 8," "Defendants' Exhibit No. 9," and our bill-heads go only to dealers,
123 presumed to be familiar with these facts. The tickets upon the spools indicate which numbers are six-cord and which numbers are not.

104 X Q. Will you produce a copy of the advertisement referred to by the language of your 76th answer, and reading as follows: "After it was advertised that all J. & P. Coats' thread was six-cord from number 8 to 100," and which advertisement you say was made between '67 and '70?

A. I have none with me, but I will try to do so.

105 X Q. Do you know of any other thread manufacturer or dealer in the United States, besides J. & P. Coats, who advertises or puts upon their boxes or elsewhere the language: "Best six-cord spool cotton, white and black, numbers 8 to 200," or words importing such meaning?

A. I have never examined any other thread critically to ascertain, but I do know that both Clark's O. N. T. thread and the John Clark, Jr., & Company's mile-end thread have the words "best six-cord" on certain boxes containing thread finer than number one hundred and made teree-cord.

106 X Q. I happen to have with me a cox of No. 110 Clark's O. N. T. thread, which I now hand you, and ask you to examine and state whether you find thereon the words "best six-cord" anywhere, except in two places, once on the inside flap, in the following connection: "All numbers six-cord from 8 to 100," and again on the top of the box where a copy of their spool label and trade-mark is reproduced with no number on the label and in very fine print?

A. I do not.

107 X Q. Is the box handed you an example of the Clark's O. N.

T. boxes containing thread of numbers higher than 100, to which you referred in your answer to X Q. 105?

A. It is not.

108 X Q. Then you think that that company puts upon the market boxes containing such thread that are more distinctly marked "six-cord" than the one produced; is that so?

A. I do.

124 The box of thread produced is here offered in evidence and marked Exhibit No. 10, Clark's O. N. T., 110.

109 X Q. In answer to X Q. 103 you said, at the end of it, "The tickets upon the spools indicated which numbers are six-cord and which numbers are not." Does there appear upon the spools of 200-yard thread, of numbers 110 to 200, inclusive, the words "three-cord," or any words importing that the thread is three-cord? I speak of Coats' thread.

A. All six-cord numbers have the words "J. & P. Coats' best six-cord" on the spool. All three-cord numbers have the words "J. & P. Coats' best spool cotton" on the spools, and no other words.

110 X Q. Coats' three-cord thread in longer lengths than 200 yards is wound upon spools plainly stamped three-cord, is it not?

A. Coats' three-cord thread on 1,200 and 2,400 yard spools is wound in numbers 40, 50, 60, 70, 80, 90, 100, which numbers on 200-yard lengths are wound only of six-cord thread. The words "three cord" under thread are stamped plainly upon the spools of 1,200 and 2,400 yard lengths to distinguish them from six-cord thread of the same lengths.

111 X Q. Then you can answer "yes" to X Q. 110, can you not?

A. I can, as above.

112 X Q. The boxes containing three-cord long lengths do not anywhere contain upon them, inside or out, the words "six cord" or "best six-cord," or anything like it, do they?

A. They do not. We never advertise 200-yard thread to manufacturers who are the principal consumers of thread in long lengths.

113 X Q. Will you state, as nearly as you can, when J. & P. Coats first introduced into this country 200-yard six-cord number 100?

A. I should have to refresh my memory to give an exact answer. I think it was between 1867 and 1870.

114 X Q. You say, in answer to X Q. 98, that Coats' 200-
125 yard 8 to 100 have embossed upon spool head "lines and stars; some have lines and some have stars, forming the arbitrary symbol claimed by J. & P. Coats as part of their trade-mark for six-cord thread. The numbers from 110 to 200 have no such marks—stars or lines."

Do you consider that the embossed marks with the absence of the embossed numeral on the spool head of Nos. 110 to 200, together with the use of the words "spool cotton," instead of the words "six cord," form such a substantial variation from the markings of the numbers 8 to 100 as that consumers are not likely to suppose they are buying six-cord thread when purchasing Nos. 110 to 200?

Objected to as immaterial and as purely speculative, and because no inference on the subject can fairly be drawn from the previous testimony of the witness.

A. It is beyond my depth.

115 X Q. I hand you a specimen of No. 110 and of No. 100 spool of Coats' 200-yard thread, taken from Exhibits Coats' Samples 14 and 15, respectively. Please look at these two spools and state whether, in your opinion, there is such a substantial difference in the mark and labels on No. 110 from those on No. 100 as that consumers are not likely to suppose they are buying six-cord thread when purchasing No. 110; and, if you say they are not likely so to do, state why—give your reasons.

Objected to as immaterial what the customers may or may not suppose, in the absence of any representations on the subject.

A. If I were buying thread myself, I would not have a moment's hesitation; one spool has the words "six cord" on it and the other spool has not.

126 116 X Q. And do you mean that it is your opinion that ordinary consumers would distinguish the two in the same way?

Same objection.

A. I see no reason why an intelligent person should hesitate in the matter; one spool has the words "six-cord" upon it, the other has not.

117 X Q. Please answer the question X Q. 116 as put with reference to ordinary consumers exercising such care as is ordinarily exercised in the purchase of this article.

Same objection.

A. I have no further opinion to express.

118 X Q. You did not hesitate to answer similar questions put you on the direct examination when asked to compare defendants' and the complainants' spool heads; why do you hesitate, therefore, to answer X Q. 117?

Same objection.

A. What similar questions do you refer to?

119 X Q. I refer to questions 26, 27, 31, and 32, with their answers.

A. I had data to go by in answering those questions—facts known to me of cases where the one thread had been mistaken for the other.

120 X Q. You answered to Q. 32 that there was such general similarity as to cause one to be mistaken for the other in the hands of the ignorant, the comparison being between Merrick's and Coats' marks on spool heads. Please express your opinion in answer to X Q. 117 and base your opinion on such experience and on such facts as you may happen to be possessed of.

Same objection.

127 A. I answered Q. 32 from facts known to me. No one except yourself has ever raised this question before, and I decline to express an opinion.

Adjourned to 2.30.

121 X Q. Seeing that the fact is that the bottoms of boxes containing numbers 110 to 200 of Coats' 200-yard thread are labeled "Best six-cord" and bear a trade-mark bearing the words "Best six-cord," will you state your opinion as to whether or not, in view of this added fact, consumers would be likely to buy numbers 110 to 200 for six-cord thread?

A. It is my opinion that the question whether the thread is six-cord or three-cord has no weight with those buying the numbers 110 to 200. What they want is the best spool cotton for their purposes, and I hold and believe that the three-cord thread from numbers 110 to 200 is the "best spool cotton" for these purposes, as explained in the answer to Q. 76. The question whether number 110 was wanted six-cord was carefully experimented upon by making number 110 six-cord for several years, and I believe that softness rather than strength (which last would be obtained by making the thread six-cord) is demanded by those using numbers 110 to 200. They want the "best spool cotton" which they can get for the particular purposes for which they use those numbers. I do not think that they buy them for six-cord thread.

122 X Q. Assuming for the moment that Coats' numbers 110 to 200 and numbers 110 to 200 of the manufacturers are all alike—three-cord, in fact—and assuming that Coats label their boxes containing such thread as six-cord, and that other manufacturers do not so label their manufacture, do not the Coats people thereby obtain an unfair advantage and impose upon the public by such proceedings?

Objected, to as all the assumptions of the question are incorrect.

128 A. I submit samples of Willimantic thread No. 110, Clark's mile-end spool cotton No. 110, Clark's O. N. T. spool cotton No. 120—all three-cord—on the labels of which the words six cord are as conspicuously printed as on the boxes of J. & P. Coats.

The samples produced by the witness are offered in evidence and marked "Exhibit Willimantic 110, Clark's Mile-End 110, Clark's O. N. T. 120."

123 X Q. Please look at "Clark's mile-end 110," just produced, and state whether you do not find on the bottom of the box the words "All numbers warranted six-cord from 8 to 100."

A. I do.

124 X Q. Please look at "Clark's O. N. T. 120" and state whether you do not find on the inside label or flap covering the spools the words "All numbers six-cord from 8 to 100."

A. I do.

125 X Q. I now hand you another box of Clark's mile-end 110

and ask you if you do not find both on the bottom of the box and on the flap the words "All numbers warranted six-cord from 8 to 100," and on the top of the box the words "Six-cord to 100."

A. The sample handed to me contains No. 110 three-cord thread with an advertisement on the top label:

"For hand and machine use.
All numbers six cord to 100.
Warranted 200 yards.
Thomas Russell,
Sole Agent
For the United States."

129 It contains on the flap or fly-leaf and advertisement:

"JOHN CLARK, JR., & CO.'S
CLARK'S
Trade
MILE END
Mark.
SPOOL COTTON.
BEST
SIX-CORD
EXTRA QUALITY
FOR
MACHINE OR HAND-SEWING. ALL NUMBERS
WARRANTED SIX-CORD FROM 8 TO 100.

USE
ARTHUR JAMES'
"INTRINSIC"
NEEDLES.

It contains on the end a label:

JOHN CLARK, JR., CO.'S BEST SIX-CORD
WHITE **110** 200 YDS.
THOMAS RUSSELL, Agent.

125 X Q. Is not X Q. 125 capable of being answered "yes" categorically? If so, please answer in that manner.

A. Yes.

126 X Q. 28 Q. and answer read as follows:

"28 Q. State what facts and circumstances are within your knowledge that lead you to believe that the labels and designs of
130 spool heads adopted by the defendant The Merrick Thread Co. were so adopted for the purpose of deceiving the public into believing that the thread manufactured and sold by them was in reality the thread of complainant-.

"Objected to as leading and incompetent.

"A. Well, several reasons: First, that they formerly used a different design; second, that in 1878 the Merrick Company wrote to Mr. H. Conant inquiring where they could obtain dies like those used by J. & P. Coats—I can produce that letter and the correspondence; third, when their attention and that of other parties copying the same designs for trade-mark was drawn to the similarity of these designs to those of J. & P. Coats they alone continued their use; fourth, that Mr. Merrick was many years ago engaged with other parties copying J. & P. Coats' trade-marks, from which they were restrained by injunction." State what facts, if any, you have personal knowledge of or accurate knowledge of in any other way that Mr. Merrick, of the defendant company, was many years ago engaged with other parties copying J. & P. Coats' trade-mark, from which they were restrained by injunction.

A. It was before my time. I only know in a general way that there were such suits.

127 X Q. Do you know anything about it except from hearsay?

A. Nothing.

The testimony of this witness on that subject is hereby objected to as hearsay.

Defendants' counsel offers in evidence the box of 110 Clark's mile-end cotton handed the witness at X Q. 125, and it is marked "Defendants' Exhibit No. 11, Clark's Mile End No. 110."

128 X Q. Will you please produce the letter referred to in
131 said answer to Q. 28 as having been written by the Merrick Company to Mr. Conant in 1878 and read the same as part of your answer?

A. I produce the letter and read it.

"Office of Merrick Thread Company, Holyoke, Mass."

(The above is a lithographed letter-head.)

"MAY 11TH, 1878.

"H. Conant, Pawtucket, Rhode Island.

"DEAR SIR: Will you have the kindness to inform us where we can get the dies made for embossing the ends of spools, such as are used on the Coats' thread spools, and much oblige—

"Yours truly, MERRICK THREAD CO.,

"Per C. W. R."

129 X Q. Who was H. Conant, to whom the letter was addressed?

A. The treasurer of the Conant Thread Company, referred to in answer to Q. 6.

130 X Q. This Mr. Conant was the patentee of the design patent for embossing the numerals on spools of thread, being patent No. 3939 and dated April 5, 1870, was he not?

A. He was.

131 X Q. And J. & P. Coats became the owners, by assignment, of that patent, did they not?

A. I believe they did.

132 X Q. And at the date of the above letter of Merrick Thread Company to H. Conant the said patent had been an expired patent for over a year, had it not? In order to aid your recollection I hand you a printed copy of the said patent and a letter from the chief clerk of the Patent Office, purporting to state that the said patent was re-issued for seven years on April 5th, 1870.

A. The patent referred to had been an expired patent since
132 April, 1877. J. & P. Coats were not then using and had not been using for three years or more the design patented by Hezekiah Conant.

133 X Q. They were using, were they not, at that time a design embracing the number of the thread embossed in the wood near the outer edge of the spool head?

A. Yes.

134 X Q. And in connection with that numeral so embossed some sort of ornamental tracery was also embossed on the outer edge of the spool head, was it not?

A. Yes.

135 X Q. Will you now produce and read the answer which Mr. Conant made to that letter of the Merrick Thread Company?

A. I produce a press copy of that letter in Mr. Conant's handwriting, which was sent to my firm at the time and which I now identify.

PAWTUCKET, *May* 13, 1878.

Messrs. Merrick Thread Co.

GENTS: In reply to your 11th, just to hand—

We don't know of any parties where you can get those dies for embossing spools on the end, "like Coats' thread spools," made for you.

The Conant Thread Co. make all used on their work, but they would make for other parties only on order from J. & P. Coats or their agents in N. Y., Messrs. Auchincloss Bros.

Yours truly, H. CONANT.

Defendants' counsel puts in evidence the copy of Conant design patent; also the letter of the Patent Office attached thereto, and the same are collectively marked "Defendants' Exhibit No. 12, Coats' Spool Head Design Patent."

Adjourned to Thursday, January 29th, 1885, at 11 o'clock.

133 FRIDAY, *January 30th*, 1885—11 a. m.

Met pursuant to adjournment.
Present: Counsel as before.

Cross-examination of HENRY B. AUCHINCLOSS continued by Mr WITTER:

136 X Q. In answer to Q. 10 you state your familiarity with the quality of the thread of the leading manufacturers, and say: "I have been in the habit of testing all threads for quality from time to time for the last twenty-five years," and in answer to Q. 20 you say you consider Merrick Company's thread as inferior in quality to Coats'. Please enumerate what are the qualities which are essential to the best thread.

A. 1st, strength; 2d, smoothness; 3d, running qualities on the sewing machine.

137 X Q. Are those all the qualities which you deem essential or important?

A. I might add, 4th, fidelity to standard of size; 5th, exactness in length; 6th, perfection in bleach, dyeing, and coloring.

138 X Q. How as to excellence of material used? Is that also essential or not?

A. The qualities named cannot be obtained without the use of the best material.

139 X Q. Will you now state all the tests which you made use of in ascertaining the relative quality of complainants' and defendants' threads as declared in your tenth and twentieth answers?

A. Measured for length, weighed for size, weights lifted for strength, bleach and color judged of by the eye. Not every test would be applied to every thread from time to time, but each one tested as occasion might require.

140 X Q. What do you consider the best quality of material—that is, of raw cotton—and which next in grade, and so on?

A. I decline to enter into such particulars; it is a very
134 complicated matter, except to answer in a general way that Sea Island and Florida cotton are esteemed the best for thread-making purposes in certain numbers.

Answer subsequently stricken out by the court.

141 X Q. What numbers?

A. I decline to answer any further particulars relating to the details of the business.

Objection subsequently sustained by court.

142 X Q. Sea Island cotton is a better material in cotton and costs more a pound, doesn't it, than Florida?

Objected to as immaterial and not cross-examination.

A. Sea Island cotton of a lower grade for twenty cents, and may have to pay thirty to thirty-five cents per pound for Florida cotton.

It is purely a question of comparison of the cotton before you. In testing a thread, a man cannot know whether it is made of Sea Island or Florida cotton; the thread must stand on its merits.

Objection subsequently overruled by court.

143 X Q. The best Sea Island ranks higher than the best Florida, doesn't it, and costs more?

Same objection.

A. It does.

Objection subsequently overruled by court.

144 X Q. What other cottons do you refer to as being
135 inferior to Sea Island and Florida, which you call the best?

Same objection.

A. I am not a cotton dealer. To enumerate all the cottons would require a cotton broker's circular.

Objection subsequently sustained by court.

145 X Q. Egyptian cotton is such an inferior cotton, is it not?

Same objection

A. I decline to enter into any further debate upon the subject of the qualities of the cottons, whether Egyptian or Tahiti, or any other long staple cotton.

Objection subsequently sustained by court.

146 X Q. You say in answer to Q. 20 that the Merrick thread "sells at five per cent. lower price in 200-yard spools" than Coats'. Do you mean to be understood that the consumer gets the Merrick's for five per cent. less than he gets the Coats'?

A. No; I mean it is sold to the jobber at five per cent. lower price.

147 X Q. What is the meaning of the number on the end of the Coats' spools opposite the table with the name J. & P. Coats upon it?

Objected to as not responsive to the direct.

A. When J. & P. Coats' thread was first introduced the leading thread was J. & W. Taylor's, which was numbered from 1 upwards. Threads were then sold by numbers, 1, 2, 3, 4, 5, &c., and even to this day in some parts of the South they are sold by the
136 numbers on the lower end of the spool. The scale is as follows:

Upper numbers: 8, 10, 12, 16, 20, 24.
Lower numbers: 1, 2, 3, 4, 5, 6.
Upper numbers: 30, 36, 40, 46, 50, 60, 70, 80.
Lower numbers: 7, 8, 9, 10, 11, 12, 13, 14.
Upper numbers: 90, 100, 110, 120, 130, 140, 150, 200.
Lower numbers: 15, 16, 17, 18, 19, 20, 21, 22.

Objection subsequently overruled by court.

148 X Q. Do you know any other of the principal makers of thread in this country who use that system?

Same objection.

A. No others that I can remember at present.

149 X Q. Those additional numbers appear also on the bottom label of the boxes, "Coats' 3-cord samples. Numbers 15, 16, 17, 18, 19, 20," do they not; and in the same place on boxes containing the other numbers, do they not?

Same objection.

A. They do not; the box numbers and thread numbers are not the same above No. 30, which is No. 6 box.

Objection overruled by court.

150 X Q. Will you please give the series of numbers on the bottom label of the boxes in one line, and in another line the numbers on the reverse end of the spools, respectively?

Same objection.

137 A. I don't think I can do that from memory, nor do I think that the box series is absolutely uniform in white and black.

Objection overruled by court.

151 X Q. Give the two series in corresponding lines as they appear on the boxes of the exhibits of white 200-yard thread before you.

Same objection.

A. Numbers on reverse of spool in upper line; numbers on boxes in lower line:

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17.
1, 2, 3, 4, 5, 6, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16.

18, 19, 20, 21, 22.
17, 18, 19, 20, 20, all white.

Objection overruled by court.

152 X Q. What does number "20," for example, on the bottom label of "Exhibit Coats' 3-Cord Samples No. 20," mean?

Same objection.

A. The size of the box.

Objection overruled by court.

153 X Q. You mean that 20 label is printed for that size of box as well as for the size of Exhibit Coats' 3-Cord Samples No. 17. Is that it, and so on with the other boxes?

Same objection.

A. They are both put in the same size box; one fits loose
138 and the other fits tight. The same thing occurs in the number 24 and number 30 thread, both in number 6 box; one fits loose and the other fits tight.

Black thread and colored thread take up coloring matter and fill the spools fuller than white thread. My impression is that box sizes for black and colored thread differ somewhat from white, but how much I can't say, for it is a minor matter of detail that I have not looked into for some time.

Objection overruled by court.

154 X Q. With the above explanation, can you answer X Q. 153 in the affirmative?

Same objection.

A. I have answered it as above and design it to be an affirmative answer.

Objection overruled by court.

155 X Q. Please state for what number or numbers of thread No. 20 box is made and number 20 box bottom label is printed.

Same objection, and witness is instructed that he need not answer any questions as to the details of his business which, like this, are not proper subjects of cross-examination on the direct.

A. You have it all in answer to X Q. 151.

Objection overruled by court.

156 X Q. Do you mean by your last answer that the boxes are made and the bottom box labels printed for the respective numbers of thread as indicated by the series specified in said 151st answer?

Same objection and instruction.

139 A. I do not. I mean that the samples before us are boxed in those boxes. Further than my answer to X Q. 153, I have nothing to say.

Objection overruled by court.

157 X Q. Are the sizes of boxes and the bottom box labels which appear upon the Exhibits Coats' Samples, containing from 8 to 200 white 200-yard thread, the size of box and the character of label which are made and printed by the complainants for the respective numbers of thread contained in those boxes?

Same objection, and witness is instructed not to answer.

A. I decline to answer.

Objection overruled by court.

158 X Q. Please read question and answer, X Q. 132, and state what design J. & P. Coats did use for the three years or more referred to in said answer in the place and stead of the Conant patent design?

A. The design now upon the spools. The three years dates from the date of the letter, May 11th, 1878, then under discussion. The design was registered as a trade-mark, as a part of the general design No. 2213, dated February 9th, 1875.

159 X Q. Do you mean such a design as now appears upon the outer rim of the spools contained in box "Coats' six-cord samples No. 14" as the design which you refer to as now used in your last answer, or the one that appears on the box of the sample containing No. 24 thread, or both?

A. Both.

160 X Q. Are spool heads an article of manufacture or sale, unconnected with the rest of the spool?

A. No.

161 X Q. Are spools without thread, label, or designating marks an article of manufacture or sale?

140 A. Without label or designating marks or thread, they are an article of sale.

Adjourned to 2 p. m.

162 X Q. I understand from you that you produce a bill-head of your company and are now willing to say that your firm bills to its customers Nos. 8 to 200 thread on 200-yard spools as "best six-cord," without distinction of number or price. That is so, is it not? I hand you a bill-head which you handed to me and which is put in evidence and marked "Defendants' Exhibit No. 13, Coats' Best Six-Cord Bill-Head."

Same objection.

A. In the answer to the 96th Q., which was: "A uniform price is charged and received by you, as agent of J. & P. Coats, for all 200-yards Coats' spool cotton from Nos. 8 to 200, and whether black or white. By uniform price I mean the same price per dozen for one number as another?" I replied: "It is." 200-yard thread has always been sold and billed at one uniform price. Prior to 1870, as previously stated, Nos. 46, 50, 60, and 70 were four-cord, and from 80 upwards they were three-cord. They were sold and billed at one uniform price, as they are this day. I produce an actual copy of a bill sold the 22d of January, 1885, to Calhoun, Robbins & Co., containing 160 dozens of thread. This is the only bill, save one sold that day, containing any thread of numbers above 100. It contained ten dozens of No. 120 thread. The quantity of thread sold in any one day of numbers above 100 is exceedingly small as compared with other numbers, and sometimes none at all. The average proportion does not exceed one dozen to every nine hundred or a thousand dozen. No attempt has been made to separate them in prices since 1842.

141 Defendants' oounsel puts the bill-head produced in evidence, and it is marked "Defendants' Exhibit No. 14, Coats' Bill-Head No. 2."

Witness continues: "We have no other bill-head for 200-yard lengths."

Objection to question overruled by court.

163 X Q. Did you make a record of the tests to which you referred in answer to Q. 10, and from which you were able to say, in answer to Q. 20, that the Merrick thread was inferior to Coats'? And, if you did, please produce it.

A. I have no record on file of tests for length, as I know that it is wound on the Conant winder, which cuts off the thread at 200-yards length automatically. I have not preserved the tests made from time to time for strength, not having specially made them for the purposes of this suit. I have before me sizings, made 23d December, 1884, of Merrick Thread Co., six-cord: number 8, 206 grains, equal 34 yarn; No. 10, 218 grains, equal 32 yarn; No. 16, 167 grains, equal $41\frac{9}{16}$ yarn; No. 20, 168 grains, equal $41\frac{5}{16}$ yarn; No. 24, 146 grains, equal 48 yarn; No. 30, 126 grains, equal $55\frac{5}{16}$ yarn; No. 60, 66 grains, equal 106 yarn; No. 70, 60 grains, equal 116 yarn; No. 80, 52 grains, equal 134 yarn; No. 90, 45 grains, equal 155 yarn; No. 100, 44 grains, equal 159 yarn, and submit samples of all but the last number, the measured thread being still attached to the spool.

164 X Q. I observe that Coats' 200-yard number 110 and upwards have embossed on the spool heads around the J. & P. Coats' label ornamented designs. When, so far as you know, were those designs or similar designs first so used on Coats' spools of 200 yards, whether high or low numbers, in this country?

Same objection.

142 A. As long as I can remember, either those or similar ornamented designs were used until the present trade-mark was adopted as registered 9th of February, 1875.

Objection overruled by court.

165 X Q. You say as long as you can remember; about how long was this in years?

A. Twenty-five or thirty years.

Same objection. Objection overruled by court.

166 X Q. Other people have done the same thing, have they not, and for as long a period as that? For example, Orr & MacNaught, as shown on "Defendants' Exhibit No. 6, Orr's & MacNaught's No. 40 Thread."

Same objection. Overruled by court.

A. Orr & MacNaught were in the market only about 18 years. They used a fish-bone pattern, and that ticket on the sample before me shows just were the difference comes in. The number on this

ticket—40—is not over the spindle-hole, but is put over the rim of the spool. J. & P. Coats' ticket is the only one of that day punched out by the sewing machine. They had a reason for seeking to change the style, and, when it was changed, adopted a peculiar style for use as a trade-mark, arbitrary symbols entirely different from those of any other manufacturer.

167 X Q. Over what period did the eighteen years which you have referred to extend, as near as you can judge?

Same objection. Overruled by court.

A. As nearly as I can recollect, from 1852 to 1870.

168 X Q. When did the Conant Thread Company commence spinning yarn for spool cotton from the raw material in this country?

Same objection. Overruled by court.

143 A. I don't recollect.

169 X Q. I would like to know about when. Say as near as you are able to.

Same objection and as already answered.

A. Well, if you are compiling a history of the spool-cotton trade, I should like to be accurate, but I really cannot recollect the exact date at this time.

Objections overruled by court.

170 X Q. I am trying to put only such questions as I think material to the case and warranted by the issues and your direct examination. When did Coats first put up 6-and 3-cord long lengths for sale in this country?

A. 1876 or 1877.

171 X Q. Is the general appearance of the spool heads of Coats' 200-yard thread of the high numbers (110 to 200), in your opinion, less like the general appearance of the spool heads of the low numbers (8 to 100) than is the general appearance of the latter to the general appearance of the Merrick spool heads (No. 8 to 100)? I refer to that head of the spool in each case which contains the name in full of the manufacturer. If you say yes, state why you think so.

Objected to as immaterial.

A. I decline to express an opinion in a question which any man examining the spool heads could answer for himself.

Objection subsequently sustained by court.

172 X Q. What I would like to have you do is to answer it for yourself.

A. I still decline.

Objection sustained by court.

144 173 X Q. Is it your opinion that the general appearance of the spool head with J. & P. Coats on the label of Nos. 110 to 200, two-hundred-yard thread, is such that ordinary consumers would recognize it as Coats' thread?

A. It is.

174 X Q. How would they so recognize it?

A. By the words J. & P. Coats' best spool cotton.

175 X Q. Referring again to the question 28, the injunction you thus refer to was obtained as much as a quarter of a century ago, was it not?

A. I don't know.

176 X Q. Do you know the name of the company against whom it was obtained?

A. Decline to add anything to testimony already objected to as hearsay.

177 X Q. Words "200 yards" or "warranted 200 yards" appears on the top label of all the boxes containing spools of 200-yard thread from No. 8 to 200.

Q. On the bill-heads like Defendants' Exhibit No. 14, Coats' Bill-Head No. 2.

3. On the label, which bears the name of J. & P. Coats, of every spool from numbers 8 to 200.

4. And on the bottom label of all the boxes containing 8 to 200 thread on two-hundred-yards spool. Is not that so?

Same objection.

A. Yes.

HENRY B. AUCHINCLOSS.

Adjourned to new motion for further cross-examination and re-direct.

NEW YORK, *June 23d*, 1884.

Met pursuant to agreement.

Examination adjourned by consent.

THOMAS HUNT,
Special Examiner.

145 NEW YORK, *24th June*, 1885—3 p. m.

Met pursuant to adjournment.

Present: Frederic H. Betts, Esq., for complainants; Wm. C. Witter, Esq., for defendants.

The witness, HENRY B. AUCHINCLOSS, now attending for further examination and to answer such questions as have been allowed by the court, and which the defendants' counsel desires answered, answers as follows:

To the 48th cross-question he says:

I cannot recollect. Twenty years is a long time to remember a competitor's use of a label.

To the 51st cross-question he answers:

Best six-cord spool cotton—that is, made of six strands.

To the 61st cross-question he answers:

I answered to the 167th cross-question, "As nearly as I can recollect, from 1852 to 1870." On further reflection and examination, I believe the correct time to have been from 1854 to 1872, or thereabouts.

In answer to cross-questions seventy-seven and a half and seventy-eight and a half, the omission to give the yarn number for twenty-four-thread is an error of the copyist. The number of the yarn for twenty-four thread is fifty.

Above number 100 we have a scale of numbering of our own, differing in each number, and satisfactory to people. I should be unwilling to enter into the details of this unless it should clearly appear to be pertinent to this suit. This much I will say: that three-cord thread is made of yarns approaching in number, although not always strictly conforming to that of the thread.

To the 80th and 81st cross-questions he answers:

I have no means of knowing, but should think the quantity very small.

146 178 X Q. At the time when cross-questions 80 and 81 were asked you, did not the top label upon all the boxes containing No. 110 three-cord J. & P. Coats' thread on 200-yards spool-bear the words "best six-cord cotton" and "best six-cord spool cotton"?

A. It did, so far as I know.

In answer to cross-question 84 I gave first order, 17th January, 1885, as soon as I saw the samples submitted by defendants' counsel. Defendants' Exhibit No. 7. I had no previous knowledge of the No. 110 thread being improperly labeled.

179 X Q. Do J. & P. Coats or the Conant Thread Company make and label the so-called Coats thread sold in the United States market?

A. The Conant Thread Company do this under contract for J. & P. Coats, J. & P. Coats being the owners of the majority of the stock and directing the Conant Thread Company by and through its president, James Coats, a member of the firm of J. & P. Coats.

In answer to question No. 157 he says:

They are up to No. 15 used for boxing No. 100 thread, according to schedule in answer to 155 X Q. Above 100 the thread is put in the nearest sized boxes. The bottom box label- appearing upon the Exhibits Coats Samples, are not printed for the thread in the box, but are general advertisements, the same in wording on all the boxes. Coats' thread is known as six-cord thread because the numbers in common use are all six-cord. Those numbers above 100, which are made three-cord because they are best in three-cord thread, as already explained, are so insignificant that it is not necessary to change our advertisements because of them.

HENRY B. AUCHINCLOSS.

The further examination of this witness is deferred to a date to be subsequently ageeed upon, the complainant- reserving a right to examine other witnesses.

147 NEW YORK, 23*d July*, 1885.

Met pursuant to notice.

Present: Mr. Betts, counsel for complainant-; Mr. Winter, counsel for defendant-.

Examined by Mr. BETTS:

LORING SEARS, a witness for complainant-, having been duly sworn, says:

1 Q. What is your name, age, residence, and occupation?

A. Loring Sears; age, 40; Fitchburg, Mass.; dry-goods and wall-paper dealer.

2 Q. Is it a part of your business to deal in spool cotton?

A. It is.

3 Q. How long have you dealt in spool cotton?

A. Thirteen years.

4 Q. What spool cottons have you dealt in during that time?

A. John Clarke's——

(Examiner asks if the name is spelled with or without the final "e," and witness replies he does not know.)

O. N. T., Willimantic, Coats', Merrick's, Kerr's. I could name a lot of cheap cottons. Do you wish me to give those? Brooks', Merrick's three-cord (that is, years ago), Lancaster, Narragansett, Eureka. That is all I remember just now.

5 Q. How long have you been dealing in Messrs. J. & P. Coats' spool cotton?

A. About ten years.

6 Q. When you speak of having dealt in Merrick's spool cotton do you mean the spool cotton of the Merrick Thread Company?

A. I suppose it to be so.

148 7 Q. How long have you dealt in this six-cord spool cotton of the Merrick Thread Company?

A. I should say about two years.

8 Q. What other spool cottons, if any, are you now dealing in—other than Coats' and Merrick's?

A. Kerr's—in a cheap cotton. I could give you that if you wish—Eureka, Narragansett, Lancaster.

9 Q. Please look at the spool heads and labels shown on Schedule C, marked "Complainants' Exhibit 200-Yds. Spool Heads," and state if those are the spool heads and labels of Coats' spool cotton with which you are familiar and in which you have dealt.

A. I should say they were.

10 Q. Please look at the spool heads and labels on Schedule G, marked "Complainants' Exhibit Defendants' 200-Yds. Spool Heads," and state if those are the spool heads and labels of the Merrick spool cotton with which you are familiar and in which you have dealt.

A. I should say they were.

11 Q. Please state of whom you have been accustomed to purchase your Coats' spool cotton and also your Merrick's.

A. Coats' spool cotton I have of late bought of S. P. Crosswell & Co.; Merrick's cotton I have bought has been of a Boston agent.

12 Q. Please state whether there is any difference in the market prices of the Coats' and Merrick's spool cotton to dealers, and, if so, what that difference is.

A. I bought Merrick's 10 per cent. less than I bought Coats'.

13 Q. Have you had any knowledge, in the course of your dealing in these two makes of spool cotton, of the Merrick spool cotton being mistaken for Coats' spool cotton by retail purchasers?

A. Only twice, I think.

14 Q. Please state those cases.

A. One was returned to one of my clerks; one was returned to myself, stating they wished machine cotton and what I gave them was basting cotton.

149 15 Q. Did you give any instructions in your store, to your clerks, as to what spool cotton was to be sold on inquiry from customers.

A. My instructions were if Coats' was called for and we were out of the number to substitute Merrick's.

16 Q. Has that frequently been done?

A. It has.

17 Q. Did you ever know of the substitution being observed or noticed at the time?

A. No, sir.

18 Q. And do I understand you to mean that the two instances that you referred to in the previous answer were the only instances where the substitution was called to your attention by the purchasers afterwards?

A. Yes.

19 Q. Why did you put in Merrick's thread on orders or request for Coats'?

A. Because I made more profit on Merrick's.

20 Q. And did you retail the Coats' and the Merrick's at the same price?

A. I did; both at five cents a spool.

21 Q. Why didn't you put in Kerr's thread, for instance, when you did not have the required numbers of Coats'?

Objected to as leading.

A. Because they would readily notice it from the shape of the spool.

22 Q. Have you here a card showing a picture of the Kerr spool cotton? If so, please produce it.

A. I have, and now produce it.

The card is offered in evidence and is marked Exhibit "Kerr's Cotton."

23 Q. Have you ever substituted or attempted to substitute Kerr's spool cotton for Coats'?

A. Never, except explaining the difference.

150 24 Q. Please state whether, in your opinion as a dealer in spool cotton, the spool heads and labels of the Merrick thread are sufficiently similar to the spool heads and labels of the Coats' thread as to render it likely that ordinary retail customers would mistake the one for the other when giving the attention that such customers ordinarily give.

A. I should say they were.

25 Q. In answer to Q. 15 you say that your instructions "were" if Coats' were called for and you were out of the number to substitute Merrick's. Have you more recently given any different instructions; and, if so, since when?

A. Since having the spools returned my instructions were not to substitute it, for fear of hurting my spool-cotton trade.

26 Q. How would it hurt your spool-cotton trade?

A. Customers calling for Coats' and then getting something else would not be likely to come after Coats' again.

27 Q. How long is it since you gave these last instructions, not to substitute Merrick's for Coats'?

A. I should say that it was over six months ago.

28 Q. Did you ever know of any person connected with the Coats' business itself being deceived by the similarity of the Merrick's spool heads and labels?

A. I have.

29 Q. Who was it and where did the occurrence happen?

A. Coats' traveling agent and in my store.

30 Q. State what occurred at the time.

A. He opened the case and took out a spool of black cotton and said he did not think it looked as well as their cotton ordinarily, not being such a good color or shade, and I called his attention to its being Merrick's.

31 Q. And was it in fact a spool of Merrick's that he had taken up and criticised?

A. It was.

32 Q. Did he suppose it was Coats' when he took it up?

Objected to as leading.

151 A. I should say, from the manner he took it out of the case, that he did.

33 Q. Did he say anything about having so supposed at the time?

Same objection, and as calling for hearsay.

A. He spoke as being surprised that he should be mistaken himself.

34 Q. What was the agent's name?

A. Hazlewood, I think.

35 Q. Is there a large sale for the Coats' spool cotton in your vicinity?

A. I should say much larger than any other; at any rate, we have more call for Coats'.

36 Q. Is there much demand for Merrick's spool cotton under its own name?

A. I could not say that I ever had a call for it.

37 Q. Are you sufficiently acquainted with spool cotton to say which is the better, Coats' spool cotton or Merrick's?

A. I don't know, of my own experience, of one being better than the other.

Cross-examined by Mr. WITTER:

38 X Q. When a customer desires a particular make of spool cotton, how does he make it known to you or your clerks?

A. By calling for that make.

39 X Q. Give an instance of what you mean.

A. If a customer comes in and calls for Coats' cotton, we know what they mean.

40 X Q. And if they desire Coats' cotton, do they ask for Coats' cotton under that name?

A. Usually.

41 X Q. Do they ordinarily specify the number that they want as well as the make?

A. Usually.

42 X Q. And can they always tell if they have got the right number and make by looking at the label?

152 A. If they examine it closely.

43 X Q. Do they have to examine Coats' or Merrick's any more closely to determine the make than they do to determine the number? Look at the Coats' and Merrick's spool heads on the exhibits before you, and then answer?

A. I should say they would; the numbers appear more prominent than the names.

44 X Q. Do you think the number is more prominent than the name on the heads, Schedule G? If so, please give your reasons for thinking so.

A. I can see the numbers plainer than I can the name.

45 X Q. There is not much difference, is there, in favor of the number on the Merrick labels?

A. I should say there was if you are looking for the numbers.

46 X Q. Which is in larger type, and more distinct, the Coats' name or the Merrick name on the same size spool head—say number 30?

A. I should say the Merrick was larger type, but not near as distinct as the Coats'.

47 X Q. Which is in larger type and more distinct in the numbers on the labels, the Coats' or the Merrick's?

A. I shouldn't think there was very much difference in the numbers, Merrick's being the larger, if any difference. I am referring to spools number 30.

48 X Q. Would you make the same answer to number 36?

A. I should say that Coats' was the larger in number 36 and more distinct.

49 X Q. How as to 40, 50, 60, and 70?

A. Same as 36. This refers to number on the label.

50 X Q. Which is in larger type on 36, 40, 50, 60, and 70, the Coats name or the Merrick name, and which also is more distinct and which occupies the most space on the label of those numbers?

A. I don't see very much difference in the size of the type,
153 taking all those numbers together. The Merrick is not as distinct; it occupies more space, the name being longer.

51 X Q. Do you observe the number of the thread on the wood of both the Coats and the Merrick spool? If so, please state what you understand is the object of that.

A. I notice the numbers, and have always supposed it to be a sort of trade-mark on the Coats' spool, not knowing any other spool cotton to be numbered in that way previous to the introduction of Merrick's, or any other since.

52 X Q. Did you ever hear any one say that that was a trade-mark of Coats?

A. No, sir.

53 X Q. Nor ever heard it hinted at by anybody, did you?

A. No, sir.

54 X Q. You are quite sure, are you, that you have never heard counsel for complainant-, or anybody connected with Coats' people say or hint that this was regarded as a trade-mark?

A. I never heard it said or hinted any farther than it was a distinguishing mark.

55 X Q. Who have you heard say or hint that it was a distin-distinguishing mark?

A. Mr. Hazlewood, travelling agent for the Coats people; I think it is "W." Hazlewood, but I am not positive about it.

56 X Q. You know what good purpose is subserved by having the number of the thread upon the wood of the spool, in addition to its appearing upon the paper label, do you not?

A. Cotton well introduced and of good quality, there being no other numbered like it, would be likely to be known by the number on the spool as well as by the name.

57 X Q. You don't know of any other reason for having the number in the wood, in addition to the number on the label, do you?

A. I don't know of any other reason than the one stated above.

154 58 X Q. Suppose the label should be lost off, or the number on the label defaced, or the number on the label punched out by the spindle of the sewing machine, or otherwise become illegible, could the purchaser or consumer, notwithstanding these accidents, determine the correct number of the thread upon the spool by observing the number in the wood?

A. He could.

59 X Q. You never heard of that idea before, have you?

A. No, sir.

60 X Q. It is an entirely new notion to you, is it?

A. It is.

61 X Q. Don't you think it is a pretty good idea?

A. I should think it is a better idea in Coats', the number being in the centre of the spool and more likely to be defaced by the sewing-machine spindle.

62 X Q. When a customer has called for a spool, say No. 40, of Coats' spool cotton and you have it in stock, state what you do next?

A. We usually give them a spool of Coats' spool cotton.

63 X Q. Do you not first get such a spool from your stock?

A. If we have it.

64 X Q. After you have got it, what do you next do? Please be exact.

Q. Do it up in a wrapping and pass it to the customer.

65 X Q. The same is true when Kerr's or Merrick's is asked for, is it not?

A. It is.

66 X Q. In what numbers of Coats' 200-yard thread do you deal? Name them all.

A. From 8 to 100, leaving out 46.

67 X Q. Have you never dealt in numbers higher than 100 of that thread?

A. No.

68 X Q. Are you familiar with the higher numbers of that thread?

A. I am not.

155 69 X Q. How does Coats' thread come to you from the seller? I mean in what shape; is it in single spools or in dozen boxes, or how?

A. In dozen paste-board boxes or wooden cases of drawers.

70 X Q. Did you have a wooden case of drawers for the Merrick thread?

A. I did; it came with the thread on the first purchase.

71 X Q. You said that Mr. Hazlewood took the Merrick spool of thread which deceived him from a case. From which case did he take the spool of Merrick thread?

A. I had previously sold my Merrick case, and then kept the Coats' and Merrick's both in a Coats case.

72 X Q. You say you have dealt in the Merrick six-cord spool cotton about two years. What do you mean by six-cord?

A. I mean what is styled machine cotton; what we consider machine cotton.

73 X Q. Do you understand what is meant by six-cord as distinguished from three-cord or do you not?

A. Six-cord machine cotton, I suppose, is made in the coarser numbers from six cords, and is more elastic and smoother finished for sewing-machine use.

74 X Q. Why did you volunteer the word "coarser" in that answer?

A. I have understood that the finer numbers were not really six-cord in any make.

75 X Q. From whom have you so understood?

Objected to as incompetent and immaterial.

A. From traveling salesmen for small warehouses.

76 X Q. Mention the names of any whom you have so understood.

Same objections.

156 A. Charles A. Temple, formerly with R. H. Stearns & Co., of Boston, now with Sylvester, Hilton & Co., of New York city—he is in the Boston office of this firm—and C. C. Spear, with S. P. Crosswell & Co., of Boston. Those are all I think of now.

77 X Q. When did you sell out the Merrick case and to whom?

A. I sold it to George F. Simonds, Fitchburg, Mass.; I should say something over a year ago.

78 X Q. Did you sell the case only or the case with the thread in it?

A. The case only.

Adjourned until 2.20 p. m.

79 X Q. You say you have dealt in John Clark's and in O. N. T. and in Willimantic spool cotton. Look at the exhibits now shown you and state if they are samples of the spool cotton referred to by you in that answer.

Witness is shown Defendants' Exhibit No. 1, Willimantic No. 50 Thread; No. 2, Geo. A. Clark's No. 50 Thread, and No. 3, Jno. Clark, Jr., & Co.'s No. 50 Thread.

A. They are.

80 X Q. How long have you dealt in the O. N. T. or George Clark cotton, marked as shown in said exhibit?

A. Ten year- or more.

81 X Q. How long in the John Clark, marked as shown in the said exhibit?

A. The same.

82 X Q. How long in Willimantic, marked as shown in the said exhibit?

A. About eight years, I should say.

157 83 X Q. Of whom and what quantity did you buy Merrick's thread at ten per cent. less than Coats'? also state when and in what numbers, as near as you can.

A. I bought what is styled a 100-dozen case, I should say about two years ago, of the traveling salesman. It came from the Boston agent, Barr.

84 X Q. Have you ever bought any since?

A. In small qantities, I think, only.

85 X Q. Of whom then?

A. Billed to me likewise, by the Boston agent, Barr.

86 X Q. How much Merrick cotton have you sold in all, as near as you can estimate?

A. Near three hundred dozen, I should say.

87 X Q. How much of Coats' have you sold, say, for a year?

A. I should say about six hundred dozen.

88 X Q. You have said that you understand "six-cord" to mean thread of six cords. What do you understand three cords to mean?

Objected to as inaccurate.

A. What we style "basting" cotton.

89 X Q. How many cords is it supposed to be made?

A. I suppose three cords.

90 X Q. How would you ascertain whether a piece of thread were three-cord or six-cord?

A. By separating the cords.

91 X Q. Did you ever do that?

A. No, sir.

92 Re-D. Q. Do you deal now in George or John Clark or Willimantic thread?

A. Only in closing out what we have on hand.

93 Re-D. Q. You spoke of having sold perhaps 300 dozen Merrick's thread. Do you mean his six-cord thread or do you include his three-cord thread in that amount?

A. I mean six-cord.

158 94 Re-D. Q. Did you ever substitute either of the Clark threads or the Willimantic thread when Coats' was ordered?

Objected to as not proper redirect.

A. No, sir.

95 Re-D. Q. Please state whether the fact that the number of the thread is embossed in the wood on the edges of the spools of the Coats and Merrick threads renders it less likely that purchasers will examine the labels particularly so as to distinguish the names; and, if so, why.

Objected to as leading and not proper redirect.

A. I should like to have that read again.

96 Re-D. Q. (Question re-read.)

A. I should say that it did, because of the similarity on account of the number being so as to tell the number held either way—I mean holding the spool either way.

97 Re-D. Q. Is it a fact that some one or more of the numbers on the embossed edge of the Merrick & Coats spool can be read right side up and the number therefore distinguished, although the name on the paper label may be upside down?

A. It is.

LORING SEARS.

Sworn to before me this 23d day of July, 1885.

THOMAS HUNT,
Notary Public.

159 P. JOSEPH O'KEEFE, a witness for the complainant-, having been duly sworn, says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?

A. P. Joseph O'Keefe; 27 years; Worcester, Mass.; I am in the dry-goods business.

2 Q. Is it a part of your business to deal in spool cotton?

A. Yes, sir.

3 Q. How long have you been accustomed to sell spool cotton?

A. A little over ten years; not always on my own account.

4 Q. How long have you been selling spool cotton on your own account?

A. About two years next January.

5 Q. Are you a member of any firm; if so, what?

A. I am; O'Keefe Bros.

6 Q. What spool cottons have you dealt in since you have been in business on your own account?

A. Coats', Clark's, Merrick's, Kerr's.

7 Q. What kind of spool cotton have you sold most of?

A. Clark's.

8 Q. In your district for what spool cottons is there, in general, the largest demand?

A. Coats' and Clark's.

9 Q. How long have you been dealing in the Merrick spool cotton?

A. About two years next January.

10 Q. Is there much demand for the Merrick spool cotton, under its own name, in your district?

A. No.

11 Q. To what extent have you sold the Merrick spool cotton?

A. About 150 dozen.

160 12 Q. To what extent have you sold the Coats spool cotton during the same period that you have been dealing in Merrick's?

A. About 30 dozen. It may, perhaps, be a trifle more than that.

13 Q. How does it happen, since the Coats thread is one of the threads in largest demand in your district and the Merrick thread is not in much demand, that you have sold so much more of Merrick's than of Coats'?

A. Because we did not care to keep two leading brands of a high thread. We carried Clark's O. N. T. and Merrick's and Coats' in a limited quantity; also a small quantity of Kerr's.

14 Q. What is the lowest price at which you are able to buy Coats' thread in the market?

A. Fifty-five cents a dozen; five per cent. off.

15 Q. And at what price do you buy the Merrick thread?

A. Fifty-five cents per dozen; ten and five off. I am giving the price of Coats' and Merrick's in one-hundred-dozen lots.

16 Q. Please look at the spool heads and labels on Schedule C, marked "Complainants' Exhibit 200-Yards Spool Heads," and state

if those are the spool heads and labels of the Coats' spool cotton with which you are familiar and in which you have dealt.

A. They are.

17 Q. Please look at the spool heads and labels on Schedule G and state if those are the spool heads and labels of the Merrick spool cotton in which you have dealt.

A. They are.

18 Q. Please state whether there is any such similarity between the heads and labels of the Merrick spool cotton with those of Coats' that ordinary retail customers would be likely to mistake one for the other.

A. Do you want me to state where the similarity exists? I think there is.

19 Q. You may state in what the similarity consists.

161 A. It exists in the paper label, and also in the embossed figure on the head of the spool—the raised figure.

20 Q. Have you known of Merrick's spool cotton being mistaken for that of Coats in your own trade?

A. I have.

21 Q. Please give some instances.

A. A little girl came into the store with a spool of Merrick's, without any cotton on or any paper label on, and said, "Give me a spool of Coats' cotton like this," presenting a spool which was Merrick's spool with the raised number on; the clerk passed her out a spool of Merrick's of the same number and at the same price that a spool of Coats' would sell for.

22 Q. Any other instances?

A. Yes; when customers have called for Coats' cotton Merrick's has been given them in place of it. That occurred quite frequently.

23 Q. Did you ever know of the substitution being noticed at the time?

A. I don't remember a case.

25 Q. Do customers frequently examine their spools to see if they get what they have ordered?

A. I don't think they do.

21 Q. Do they sometimes?

A. Yes; I should think about one-third did, where two-thirds did not.

27 Q. Of whom have you bought the Merrick spool cotton?

A. Of the Merrick Thread Company and also of C. A. Potter, the man whom I bought out in Worcester; I mean I bought his business.

28 Q. Did you ever buy any Merrick spool cotton of any agent or commission merchant?

A. Yes; that is how I bought it; not by going to the house directly.

29 Q. Through whom did you buy the Merrick spool cotton?

A. Indirectly through W. G. Pierce, of Boston, and directly of an agent traveling for the Merrick Thread Company.

162 30 Q. Would you explain a little more fully what you mean?

A. W. G. Pierce, of Boston, had sold Merrick thread at different times, and tried several times to sell me a 100-dozen lot, saying that the cotton was so near like Coats' that customers would scarcely know the difference, and also that I would be making an extry ten per cent. I gave Mr. Pierce an order for a 100-dozen case and the firm refused to send it, claiming that Mr. Pierce was no longer their agent, and the firm sent this agent, of whom I bought a 100-dozen case.

31 Q. When you say that Mr. Pierce represented to you that the cotton was so nearly like Coats' that customers would scarcely know the difference, did you understand him to refer to the quality of the thread or the get-up of the spool and labels?

A. He referred to both.

32 Q. And what has been your experience as to whether or not customers do notice the difference of the spools and labels of Merrick's and of Coats'?

A. They have not, except on close examination.

33 Q. Is your experience sufficient to enable you to say whether the quality of the Merrick thread is equal to that of Coats'?

A. No; I don't think I have experience enough to say.

34 Q. Have you had any complaints from any of your customers when Merrick's thread has been furnished, in regard to its quality as compared with Coats'?

A. No; we have not.

35 Q. Have you made a specialty of selling Merrick's thread?

A. Yes.

36 Q. Have you ever substituted, when Coats' thread has been ordered, any other spool cotton except Merrick's?

A. No; we have not.

37 Q. Do you keep your Coats' and Merrick's thread together? If so, in what cabinet.

A. Yes, sir; in Merrick's cabinet.

163 Cross-examined by Mr. WITTER:

38 X Q. For what price can you buy 1,000 dozen of Coats'?

A. I could not say exactly. I never said much in regard to 1,000 dozen of Coats'.

39 X Q. I understood you to say, on your direct examination, something about the price of 1,000 dozen of Coats', if bought during six months. What information have you on that subject?

A. Nothing more than talking with other dealers.

40 X Q. Please state the substance of that talk.

Objected to as incompetent and immaterial.

A. Well, I had the impression from that talk that if I had used 1,000 dozen in six months, at the end of that time I should receive a rebate, but I don't remember how much, but have the impression that it would amount to six per cent. extra.

41 X Q. In answer to Q. 21, narrating the incident of the purchase by the little girl, you say she presented a spool which was

Merrick's spool, without any label or thread on it; how was this spool known to be Merrick's instead of Coats'?

A. Because she called for Coats', and we had but a very little Coats' in stock, and the young lady clerk called my attention to the fact that she had been substituting Merrick's for Coats', and I told her it was not best to do that, especially with children.

42 X Q. What is the similarity in the paper labels that you referred to in answer to Q. 19?

A. The size and the gold on black; that's all, with regard to the paper label. I might say, the circular manner in which the letters are placed on both.

43 Re-D. Q. Do you know who this little girl you have spoken of was?

A. Yes.

44 Re-D. Q. Had the person she came from been accustomed to buy thread of you?

A. Yes.

164 45 Re-D. Q. Had she previously purchased from you Merrick thread for Coats'?.

A. She did of the clerks in the store but not of myself.

JOSEPH O'KEEFE.

Sworn to before me this 22d day of July, 1885.

THOMAS HUNT, *N. P.*

165 NEW YORK, *24th Nov.*, 1885.

Met pursuant to notice.

Present: Mr. Frederic H. Betts and Mr. Varnum for complainant-, and Mr. Witter and Mr. Kenyon for defendants.

THEODORE M. IVES, a witness for the complainant-, having been duly sworn, testifies and says:

1 Q. What is your name, age, residence, and occupation?

A. Theodore M. Ives; age, 41; 201 West Fifty-fifth street, N. Y. city; agent for the Willimantic Linen Company.

2 Q. What is the business of the Willimantic Linen Company?

A. Manufacturers of spool-cotton thread.

3 Q. How long have you been familiar with the trade in spool-cotton thread in this country?

Q. For over 15 years.

4 Q. Please state what the rank and position of the Willimantic Company is in the spool cotton-thread-trade?

A. They are leading manufacturers of all kinds of sewing threads, particularly of six-cord 200-yd. thread for family use.

5 Q. In what way have your duties made you familiar, if at all, with the spool-cotton trade in this country.

A. In the way of handling and selling that portion of the Willimantic Linen Company's product sold through their New York agency for the past eleven years, and previous to that time, for a period of fourteen years, through being connected with the manufacturing department of said company.

6 Q. Are you familar with most of the brands of spool cotton dealt with in the United States, and with their distinguishing marks and labels, and how long have you been familiar with the same?

A. I am familiar with the brands of spool cotton dealt
166 with in the United States, and have been so for eleven years past.

7 Q. Please enumerate some of the different brands dealt in in the United States with which you are familiar.

A. The Coats', Clarks's O. N. T., Clark's mile-end, Brooks', Kerr's, and Merrick's.

8 Q. Can you state from your knowledge of the trade in spool cotton what the comparative amount of sales of cotton threads known by the numbers over 100 and up to 200 is as compared with the amount of sales of the numbers below and inclusive of No. 100? If so, please do so.

A. In our case less than one-tenth of one per cent., and I have no reason to suppose that we are an exception to the trade generally in this respect. I refer to 200-yd. lengths.

All except the words "in our case less than one-tenth of one per cent." objected to as incompetent.

9 Q. From your knowledge of the spool-cotton trade, state whether or not the sales of spool cotton of the higher numbers, above 100, is insignificant as compared with the sales of numbers below and inclusive of No. 100.

A. I should say decidedly insignificant.

10 Q. State, if you know, whether the thread of the leading manufacturers of spool cotton known by the Nos. 110 to 200, inclusive, is three-cord thread or six-cord thread.

A. To my best knowledge and belief they are three cords in all cases.

11 Q. State from your knowledge of the thread business whether in your opinion and judgment the finer threads from Nos. 110 to 200, inclusive, are best when manufactured from three cords or six cords, and give your reasons for your opinion.

A. In my opinion they are best for the purposes used when manufactured from three cords, for the reason that these purposes
167 differ from those for which No. 100 and below are used, the purposes for which Nos. 110 to 200, inclusive, are used being mostly, if not entirely, for fine hand sewing, including embroidering and sewing of like character, there being no demand for these numbers for use on sewing machines.

12 Q. Why is three-cord thread better than six-cord thread for embroidering and fine hand sewing?

A. They are better because softer, being made of three strands instead of six; they do not require the same amount of twist put into the six-cord number.

13 Q. Please state from your knowledge of the thread business whether there would be any motive for a manufacturer of spool cotton to represent that his numbers of thread above 100 were made of six cords.

A. I know of none.

14 Q. Are you familiar with the style, marks, spools, spool heads, and labels used by Messrs. J. & P. Coats in putting up their thread for the market and shown on Schedule C, which is marked "Complainants' Exhibit 200-Yard Spool Heads"? If so, how long have you been familiar with the same?

A. I am and I have been for over ten years.

15 Q. Please state what the reputation of the J. & P. Coats thread is and to what extent it is known in the retail trade, especially as a family thread.

A. I should say that the J. & P. Coats threads have the reputation of being the leading brand in the market, and in the retail trade it probably stands unequaled in reputation as an article of sale.

16 Q. Do you know whether or not the thread is popularly and extensively known in families?

A. I should say almost universally.

17 Q. Please state whether said Coats' thread has become popularly and generally known by any distinctive marks or appearances; and, if so, what.

Objected to, as the witness has not been shown to be competent to answer this question.

168 A. The general appearance of the head or top of the spool, being characterized by embossed figures on the periphery, together with black and gold label, would, in my opinion, make distinctive marks by which Coats' thread is known.

18 Q. Are you familiar with spool heads and labels used by the Merrick Thread Company on their 200-yard six-cord spool cotton, samples of which are shown on Schedule G of Complainants' Exhibit Defendants' 200-Yard Spool Head; and, if so, how long have you been so familiar?

A. I am and have been for over one year.

19 Q. Prior to the introduction of said spool cotton with the style of spool heads and labels shown on the last-mentioned exhibit had the Merrick Company been known to any extent as manufacturers of spool thread for family use?

A. Not to my knowledge.

20 Q. Please state whether, in your opinion as a dealer in spool cotton, the spool heads and labels of the Merrick Thread Company shown on Schedule G are so similar to the spool heads and labels of the Coats thread shown on Schedule C as to render it likely for ordinary retail customers to mistake one for the other when giving that degree of care and attention which such customers ordinarily give.

Same objection as to question 17.

A. I should say that it would be very likely that one would be mistaken for the other.

21 Q. Why so?

A. Simply because of the general resemblance which one bears to the other through the embossed figures in combination with the black and gold labels.

22 Q. Please state from you- knowledge of the spool-cotton business whether the boxes in which dozens of spool cotton are put up for the market ordinarily come into the possession or are called to the attention of retail consumers.

Same objection as to question 17.

169 A. I think the retail consumer rarely buys a dozen of thread of one number put up in a box.

Cross-examined by Mr. WITTER:

23 X Q. You have not been in the habit of selling thread at retail, have you?

A. No, sir.

24 X Q. Your dealings have been confined to what is known as "the trade," have they not?

A. Yes, sir.

25 X Q. What do you understand by the word "trade," as referred to in your last answer?

A. Such dealers as, by reason of capital and experience, would be apt to buy their goods at first hand.

26 X Q. And ordinarily in large quantities—is not that so?

A. Not necessarily so.

27 X Q. Please state briefly the limitations that you have in mind.

A. The limitations would not exclude single purchases of small quantities, provided they are at least in dozen lots.

28 X Q. Then, if I understand you, your dealings have been exclusively with those purchasers who buy at least one or more boxes of thread, put up in dozens. Am I right?

A. That is the correct understanding.

29 X Q. To what class of dealers does the trade with whom you deal make its sales?

A. The retail trade mostly.

30 X Q. By retail trade you mean dealers who buy and sell, do you not?

A. Yes, sir.

31 X Q. What quantity of, say, No. 100, two-hundred-yards six-cord thread of your company's make is used for fine sewing and embroidery as compared with No. 110? State as near as you can form an opinion.

A. I should say a small quantity comparatively with No. 110. I have no positive data to go by, but judge simply by the classes of trade buying these numbers.

170 32 X Q. Do you mean that the trade which buys No. 100 does not buy No. 110?

A. I do; I mean to say, generally speaking.

33 X Q. Would you make the same answer as to No. 90?
A. I should.
34 X Q. And of No. 80?
A. Yes, sir.
35 X Q. And of Nos. 70 and 60?
A. Yes, sir.
36 X Q. Is No. 100 Willimantic thread of two-hundred-yards length really six-cord thread?
A. Yes, sir.
37 X Q. Is it so marked?
A. It is.
38 X Q. Where? Name all the places.
A. Upon the label of the spool and upon the box containing a dozen spools, in two places, and upon the fly-leaf within the box.
39 X Q. Is your No. 110 six-cord?
A. No, sir.
40 X Q. Do you mark it six-cord, either upon the spool or boxes?
A. The boxes are marked six-cord, but not the spools.
41 X Q. How as to No. 120?
A. I am not positive about that. Upon looking at a box of 120 I find it marked six-cord.
42 X Q. How as to No 150?
A. My impression is that it is marked similarly to the No. 110 and No. 120.
43 X Q. Will you kindly produce, after the recess, a box containing a dozen spools of Willimantic 200-yard thread of Nos. 50, 100, 110, 120, 150, and 200?

Objected to as not cross-examination.

A. I will.
44 X Q. Does your company sell three-cord thread in other lengths than 200-yard lengths?
A. Yes, sir.
171 45 X Q. Without being accurate, about what is the relative cost of manufacture of three-cord to six-cord thread of like numbers?

Same objection.

A. I could not answer that question accurately enough for it to be satisfactory.
46 X Q. Does that relation bear a pretty close relation to the relative selling prices of the two classes of goods?
A. I do not think that it does, because competition and attendant circumstances affect the selling prices independent of the cost of manufacture.
47 X Q. Does it not cost something like a third more to make six-cord thread than it does to make three-cord thread of the same number?
A. The question being a technical one, pertaining to the manufacturing department of our business, with which I am not accurately familiar, I would prefer not to answer.

48 X Q. Are not the high numbers, 110, &c., largely used upon sewing machines for the manufacture of straw goods?

A. They are.

49 X Q. Is it the practice of your company to wind its black thread on white spools and its white thread on black spools, and to label the spools as shown in Defendants' Exhibit No. 1 Willimantic No. 50 Thread, which is white, and Defendants' Exhibit No. 15 Willimantic No. 120 Black Thread (here offered in evidence), the former of said exhibits being white thread; is not that so?

A. It is.

50 X Q. How long has that been true, so far as you know?

A. I should say for 15 years.

51 X Q. Referring to the black and gold labels in concentric rings upon the numbered ends of these spools, I ask you whether the leading manufacturers of thread in this country do not
172 use such a label upon their six-cord 200-yard thread—that is to say, a label of black and gold or gilt, in concentric rings?

Same objection; also as vague and indefinite.

A. I do not understand the question.

52 X Q. The Willimantic Company, the Merrick Company, Coats, the two Clarks, Orrs & McNaught have all for many years used upon their 200-yard six-cord thread a label colored in black and gold, have they not?

A. They have.

53 X Q. And these colors of black and gold have been arranged in concentric rings, have they not?

A. I think they have.

54 X Q. And the black and gold label of the Willimantic thread has the name Willimantic Linen Co. plainly printed on the label, has it not?

A. It has.

55 X Q. Why is that name plainly printed on that label?

A. To designate the goods as of our manufacture.

56 X Q. Designated to whom?

A. To any one having occasion to buy the goods.

57 X Q. The No. 50 upon the Exhibit No. 1 of the Willimantic thread is put upon the label for what purpose?

A. To designate the number of the thread.

58 X Q. And the words and figures 200 yds. to designate what?

A. To designate the number of yards.

59 X Q. Now, these various designations of the source of manufacture, of the number and length of the thread, are efficient, are they not, to convey to the purchaser the information they were intended to convey?

A. These designations are supposed to be placed upon the spool for this purpose; whether always effective or not I am unable to say.

60 X Q. Looking solely at the numbered head of a spool
173 of Willimantic No. 50 black thread and at the correspond-

ing heads of a Coats spool and a Merrick's spool of the same number, would not a purchaser, exercising ordinary care, be as likely to mistake the Willimantic for the Coats as the Merrick? And, if you say he would not, give all your reasons?

Objected to as immaterial.

A. I think he would not on account of a closer general resemblance between the Merrick's and Coats' numbered ends. This difference between the two above-mentioned threads and the Willimantic, I think, lies in the absence in the Willimantic numbered head of the embossed number on the periphery of the spool and a closer resemblance between the Merrick and Coats black and gold labels in their general style by comparison with the Willimantic.

61 X Q. Then you don't think the ordinary purchaser would be likely to mistake the Willimantic thread for the Coats thread, looking at the label alone. Is that so?

Objected to as immaterial.

A. No, sir; I do not think he would.

62 X Q. How long have you been familiar with the six-cord 200-yd. thread of the Merrick Company?

A. I am unable to state exactly, but should say for over a year.

63 X Q. The Willimantic Company and the Coats people are interested with each other in their thread-winding machinery, are they not, through the Conant Thread Company?

Objected to as immaterial and irrelevant.

A. No, sir. I do not understand the relation of the parties to that invention.

Redirect examination by Mr. BETTS:

174 64 Re-D. Q. Are the boxes in which your company's thread is put up, both those of numbers under 100 and over 100, all labeled alike both on the top, bottom, and fly-leaf?

A. I think they are.

65 Re-D. Q. Is there any intention by those similar labels on all the boxes to represent that the particular number of spool cotton contained in the particular box is made of six cord- or strands?

Objected to as incompetent.

A. There is no such intention.

66 Re-D. Q. In answer to X Q.'s 32, 33, 34, and 35 you say that the trade which buys No. 110 does not buy No. 100 or No. 80 or No. 90 or No. 70 or No. 60. Is it true that the trade and market for all the numbers above 100 is different from that for 100 and below? I am referring to 200-yard lengths.

A. I meant to say that the uses to which numbers up to No. 100, inclusive, are put to differ essentially from the uses for which No. 110 to No. 200, inclusive, are put to.

67 Re-D. Q. In answer to X Q. 48 you said that the high num-

bers, 110, &c., are largely used on sewing machines for the manufacture of straw goods. Were you referring in that answer to the 200-yard lengths or to long-length thread?

A. To the long lengths.

68 Re-D. Q. On what spools do such lengths come?

A. On 1,200 and 2,400 yards—principally 1,200 yards.

THEODORE W. IVES.

Sworn to before me this 24th day of November, 1885.

THOMAS HUNT,
Special Examiner.

Adjourned to 11 o'clock, Nov. 25th, 1885.

175 NEW YORK, *25th November*, 1885.

Met pursuant to adjournment.

Present: Mr. Frederic H. Betts and Mr. Varnum, counsel for complainant-, and Mr. Witter, for defendant-.

FRANK E. STACY, a witness for the complainant-, having been duly sworn, testifies as follows:

1 Q. What is your name, age, residence, and occupation?

A. Frank E. Stacy; age, 26; South Berwick, Maine; dealer in dry and fancy goods, both.

2 Q. How long have you been engaged in your present business?

A. A little over five years.

3 Q. Is it a part of that business to deal in spool cotton at retail?

A. It is.

4 Q. Please state what brands or makes of spool cotton you have dealt in.

A. Dealt in Coats', Merrick's, Geo. Clark's, John Clark's, and Willimantic.

5 Q. How long have you dealt in Coats' thread?

A. I have sold the Coats thread for eight years, and on my own account for five years.

6 Q. How long have you been selling the Merrick thread?

A. About eighteen months, or very near that.

7 Q. Which of all the makes or brands of thread mentioned do you find is the most popular, best-known thread, in your locality?

A. I think that Coats' and Willimantic are about the same.

8 Q. And those two threads are more popular and better known than the others mentioned by you?

A. Well, I think they are more used, though not better known than both the Clarks. Merrick's thread is a new thread and not so well known.

176 9 Q. Have you ever had any inquiry for Merrick's thread by name?

A. I have.

10 Q. How often?

A. Only once, to my knowledge.

11 Q. And about when was that?

A. That was possibly about a month ago.

12 Q. In your store do you keep all the different styles of thread in which you deal together in one cases or in separate cases?

A. Keep them all in one case.

13 Q. Please look at Schedule C, "marked Complainants' Exhibit 200-yd. Spool Heads," and state if those are correct samples of the spool heads and labels of the Coats' thread in which you have been accustomed to deal.

A. They are.

14 Q. Please look at the samples of spool heads and labels on Schedule G, "marked Complainants' Exhibit Defendants' 200-yd. Spool Heads," and state if those are correct samples of the spool heads and labels of the Merrick thread in which you have been accustomed to deal.

A. They are.

15 Q. Please state whether, in your experience in dealing in spool cotton, you have had any difficulty in distinguishing between any or either of the brands of spool cotton in which you deal; and, if so, between which.

A. I have; between Coats' and Merrick's.

16 Q. Please state what, in your experience, occasions the difficulty in distinguishing between those two brands.

A. The embossed numbers on the head of the spool, the color, and general appearance of the label.

17 Q. In your dealings in spool cotton have you, yourself, ever mistaken the spools of one thread for the other?

A. I have.

18 Q. Have you ever had any dfficulty in distinguishing
177 between the spools and labels of any of the other makes of thread in which you have dealt, or have you ever mistaken any of the other spools than Merrick's for Coats'?

A. I have not.

19 Q. Please state, from your experience as a dealer in spool cotton, whether, in your opinion, the similarity between the spool heads and labels of the Merrick thread and those of Coats is sufficiently close as to be likely to deceive ordinary retail customers, giving the amount of care and attention which such customers ordinarily do.

A. I think the threads can very easily—very—can hardly tell one from the other—impossible to tell one from the other.

20 Q. Why do you think that is would be very difficult or impossible for ordinary retail customers to tell one of said threads from the other?

Objected to as leading.

A. Customers who are acquainted with Coats' thread tell it by the embossed numbers on the head, and unless they read the labels they could very easily mistake one for the other.

21 Q. Is it your experience that retail customers often do give such attention to the thread as to read the labels?

Objected to as leading.

A. A very small percentage of them may; part of them do read the labels.

22 Q. Please state whether you regard the color and general appearance of the Merrick paper label on the head of the spool as likely to be mistaken for Coats'.

Objected to as leading and as immaterial.

A. I think it could be very easily mistaken for Coats'.

178 Cross-examined by Mr. WITTER:

23 X Q. In your last answer have you reference to the labels alone, without any other consideration?

A. Well, if the label alone were on a plain spool, with no embossed figures on it, I should not think it was a substitute.

24 X Q. The Merrick would then be in the same category as the black and gold labels of the Willimantic and the Geo. Clark and the Orrs & McNaught, all of which I now show you, would it not?

A. I think it would.

25 X Q. Have you been familiar with Orrs & McNaught's thread or dealt in it to any extent?

A. I have not. I never dealt in it at all.

26 X Q. You said, in your direct examination, that you had never had Merrick's thread asked for but once by name, to your knowledge. What do customers ask for by name when they do not ask for Merrick's?

A. Usually for either Coats' or Willimantic.

27 X Q. And they can always tell whether they have got Coats' or Willimantic or Merrick's, can they not, by looking at the label and reading the name?

Objected to as immaterial.

A. By reading the names they can.

28 X Q. The number of the thread has a like prominence with the name on these labels—Willimantic, Coats', Merrick's—has it not?

A. The numbers are situated differently on the labels; the numbers are prominent on all three of them.

29 X Q. Do you mean, by your last answer, that the number of the thread is situated in a different place upon the Willimantic and Merrick labels from what it is upon the Coats' label? And, if you do, state the difference in location.

A. It is situated different on the Willimantic and Merrick's from what it is on the Coats.

179 30 X Q. How differently?

A. It is situated in the centre on Coats' and below, at the bottom of the label, on the Willimantic and Merrick's.

31 X Q. You say in answer to X Q. 28 that the numbers are prominent on all three of these labels. Why are these Nos. given such prominence?

A. Because it is quite necessary that they should be prominent.

32 X Q. Why?

A. To distinguish the No. of thread that the person wishes.

33 X Q. What is the advantage of having the number in the wooden periphery of the spool in addition to its appearing on the paper label?

Objected to as not proper cross-examination.

A. If the label be lost there is nothing to tell what number of thread it is unless it is on the head of the spool.

34 X Q. The same difficulty would occur in case the number on the label were defaced or torn away from the rest of the label or otherwise made indistinct, would it not?

Same objection.

A. It would.

35 X Q. Of whom did you purchase the Merrick thread you dealt in?

A. Of the traveling agent of the Merrick Thread Company.

36 X Q. Can you tell whether the goods came to you from Boston or from the Merrick Company's factory at Holyoke?

Objected to as immaterial.

A. I could not.

180 37 X Q. Do you know anything about the length of time during which the Merrick Company have made and put upon the market six-cord spool cotton in 200-yd. lengths or do you only mean that the thread is a comparatively new thread to you?

A. I do not know how long it has been made or put upon the market, but I mean that it is a new thread to me and in my place in Maine.

38 X Q. You say that you keep all your threads in the same case. Whose case is it?

A. I keep it all in one case—Merrick's case.

39 X Q. It is a practice of the principal thread-makers to furnish cases for their threads, is it not?

A. It is if you buy a certain amount of thread at once.

40 X Q. Is it not a fact that all over the world, so far as you know, 200-yd. six-cord thread is sold upon spools a good deal alike in size, shape, and appearance, and that circular labels of black and gold—black and gilt—are used upon one end of such spools, said labels containing upon them the name of the maker, the number of the thread, the length of the thread, and, generally, the quality of the thread (as that it is six-cord), and is it not for this reason, as you understand it, that the name of the maker is placed prominently upon each of such labels as well as the number of thread?

Objected to as not proper cross-examination and as calling for the opinion of witness on a subject concerning which he is not shown qualified to express an opinion.

A. Well, I think it is, so far as I know. The spools are similar

and they all have circular labels. The colors are similar on all but one, I believe, that I know of, but the coloring is entirely different on some—there is more black on some than on others, which entirely changes the appearance of the label. The name is put on the same in all—I think the same prominence. The number is on all the labels. Whether the "six-cord" and "200-yd." is on all I could not say.

181 41 X Q. In addition to the other distinguished marks, the Willimantic label and the Merrick label have at their centres the one an eagle and the other a star, neither of which is found upon the Coats label. Is not that so?

A. Yes, sir.

42 X Q. And in each case the star and the eagle are put in the position occupied by the number on the Coats label. Is not that so?

A. It is.

43 X Q. You are familiar with these differences, are you?

A. I am.

44 X Q. On which label, the Merrick or the Coats, are the words "best six-cord" most prominent and what do these words mean?

Counsel for complainant objects to the latter half of the question for reasons given in last objection.

A. They are more prominent on Coats' thread. They mean that the thread is six-ply thread.

45 X Q. And that is what those words mean when you find them on the boxes of thread, is it not?

Same objection as last.

A. It is.

Redirect examination by Mr. VARNUM:

46 Re-D. Q. Referring to the labels mentioned in X Q. 24, to wit, the Willimantic, the Geo. Clark, the Orrs & McNaught, and the Merrick, which of these labels do you consider to most resemble those of J. & P. Coats?

A. Well, I think that the Merrick thread label resembles J. & P. Coats' the most.

182 Recross-examination by Mr. WITTER:

47 Re-X Q. What makes you think so?

A. The size of the label; the name J. & P. Coats and Merrick appear in the same circle, and there is the same blur over both labels as they appear in the cases—I mean the cabinet.

FRANK E. STACY.

Sworn to before me this 25th day of November, 1885.

THOMAS HUNT,
Special Examiner.

ANDREW S. MARCH, a witness for the complainant, having been duly sworn, testifies as follows:

1 Q. Please give your name, age, residence, and business.

A. A. S. March, Jr.; reside in Newton, Mass.; age, 24; salesman for A. S. March & Co., Boston, commission merchants and agents in Boston for J. & P. Coats.

2 Q. Are you familiar with the different brands of cotton thread sold in this country and how long have you been so familiar?

A. Yes; with the principal brands for about nine years.

3 Q. Give the name of brands and their labels, &c., with which you are familiar.

A. Clark's O. N. T., Clark, mile-end, Willimantic Linen Co., J. & P. Coats, Brooks, and Merrick Thread Co. and Kerr's, and I know the general appearance of the labels and spool heads of said brands.

4 Q. Please state, from your experience as a dealer in spool cotton, whether, in your judgment, there is such a resemblance between the marks and labels of the six-cord thread of the Merrick Thread Company and those of J. & P. Coats as to mislead or deceive
183 an ordinary consumer exercising such care as is usually exercised in the purchase of thread.

A. There is.

5 Q. Do you refer to the 200-yard length spools or to the long lengths, or both?

Objected to as immaterial to any issue in the case, so far as any other than 200-yard lengths is concerned.

A. To the 200 and the 500. Other lengths I am not familiar with.

Same objection.

6 Q. State in what the similarity consists as to the 200-yards spools.

A. In the spool heads, the labels, the knarling, in the ticketing, and the general appearance of the heads of the spools.

7 Q. State in what the similarity consists as to the 500-yard spool lengths.

Counsel for defendant- objects to the question as immaterial to any issue raised by the pleadings, and states, furthermore, that he is assured by complainants' counsel that the understanding is that the issue is limited to the alleged infringement to the marks upon the 200-yard thread.

Complainants' counsel states that the bill of complaint as amended fairly presents and shows complainants' claim.

Defendants' counsel says that complainants' counsel just states in presence of the examiner that he frankly admits that there is no issue except as to the 200-yard lengths, and the examiner is asked to certify the correctness of this statement.

Defendants' counsel continues and says that the examiner
184 objects to putting upon the record the expressed understanding of Mr. Varnum to the effect that the pleadings limit the

issue to one of alleged infringement of the marks upon 200-yard lengths without Mr. Varnum, complainants' counsel, requests it.

Complainants' counsel does not make such request.

A. In the knarling of the spool ends on the heads of spools.

ANDREW S. MARCH, JR.

Sworn to before me this 25th day of November, 1885.

THOMAS HUNT,
Special Examiner.

Adjourned to a week from Thursday, the 3d day of December, 1885.

NEW YORK, *Dec. 3d*, 1885—11 a. m.

Examination adjourned, by consent, to Monday, Dec. 7th, at 12 m.

NEW YORK, *December* 7, 1885.

Met pursuant to adjournment.

Present: Counsel as before.

THOMAS RUSSELL, a witness on behalf of the complainant-, having been duly sworn, deposes as follows:

1 Q. What is your name, age, residence, and occupation?

A. Thomas Russell; age, 56; Montclair, New Jersey; I am the selling agent of the Clark Mile-End Spool Cotton Company, of the firm of Thos. Russell & Co.

185 2 Q. How long have you been in the spool cotton business?

A. Since May, 1845; forty years.

3 Q. And how long have you been connected with the sale of the Clark mile-end spool cotton?

A. I have been their agent in this country since 1856, twenty-nine years.

4 Q. Have they been during that period one of the leading manufacturers of spool cotton?

A. Yes, sir.

5 Q. Are you familiar with most of the brands and makes of spool cotton dealt in in the United States and their distinguishing marks and labels; and, if so, how long have you been so familiar?

A. Yes; for twenty-nine years.

6 Q. Please give the names of some of the different brands and makes of spool cotton dealt in in the United States.

A. There is J. & P. Coats', Clark's O. N. T., Willimantic, Brooks', Kerr's, of course our own, and Merrick's.

7 Q. Please state, from your knowledge of the trade in spool cotton, what the comparative amount of sales of such cotton is of the high numbers in 200-yard lengths—above No. 100 and to No. 200—as compared with the amount of sales of the numbers below, and inclusive of 100.

A. I can only speak of our own trade in that; it is less than 1.10 of one per cent.

7½ Q. Have you any reason to suppose that the proportionate sales of these high numbers of spool cotton is greater in the case of other manufacturers than with yourselves?

A. No, sir.

8 Q. State whether spool cotton known by the numbers 110 to 200, inclusive, is, in case of your manufacture, three-cord thread or six-cord thread.

A. Three-cord.

9 Q. So far as you know is the same true of these high numbers of thread in case of all other manufacturers?

A. So far as I know, it is true.

186 10 Q. State, from your experience in the thread business, whether three-cord or six-cord is better for the numbers of spool cotton Nos. 110 to 200, inclusive.

A. Certainly, if we did not think so we should make it six-cord.

11 Q. Please state why three-cord thread is better than six-cord for these high numbers.

A. Well, as they are used for very fine material strength is not so much an object as softness.

12 Q. And is three-cord thread softer than six-cord?

A. Yes; made of those fine yarns.

13 Q. Please state whether there would be any motive for a manufacturer of spool cotton to represent that his numbers of thread above 100 were made of six cords.

Objected to as irrelevant, incompetent, and immaterial.

A. I don't think so.

14 Q. Are you familiar with the spool heads and labels used by Messrs. J. & P. Coats, shown on Schedule C and marked Complainants' Exhibit 220-Yd. Spool Heads?

A. Yes, sir.

15 Q. Please state what the reputation of the J. & P. Coats thread is in the market.

A. I think it stands at the head of all the threads in regard to reputation.

16 Q. Please state whether the Coats thread has become popularly and generally known as put upon its spools by any distinctive marks and appearances; and, if so, what.

Objected to as incompetent.

A. By its labels and the distinctive embossing of the numbers on the spools.

187 17 Q. Are you familiar with the spool heads and labels used by the Merrick Co. on their 200-yd. spool cotton, samples of which are shown on Schedule G, "Complainants' Exhibit Defendants' 200-Yd. Spool Heads"?

A. Yes, sir.

18 Q. How long have you known of the use of those spool heads and labels by the Merrick Company?

A. It is only two or three months since I first saw this style of label with the figures embossed on the spool.

19 Q. You had known of the Merrick Company's goods having been put up in other styles before that time?

A. I have known of them being put up, but I cannot say that I have ever seen them. I think I have.

20 Q. Please state whether, in your opinion, the spool heads and labels of the Merrick Thread Company, shown on Schedule G, are sufficiently similar to the spool heads and labels of the Coats thread, shown on Schedule C, as to render it likely that an ordinary customer, giving that degree of care and attention which such customers give, would be deceived or led to mistake the Merrick spool for the Coats.

A. I think that he would be very likely to be deceived.

21 Q. Why?

A. Principally from the numbers being embossed on the spools, that being a distinct characteristic of Coats' spool, and the label, being black and gold, contributes to giving the general appearance of Coats' thread.

22 Q. In your opinion are the black and gold labels of the Merrick Company well executed or are they indistinct? I ask you at the request of defendants' counsel to answer the question, basing your answer on your knowledge of the Merrick labels in the market, as counsel for the defendant- has stated that the exhibits in evidence may have become blurred.

A. I have seen so little of it in stock for sale that my opinion is given on what labels I have seen, and they are certainly very imperfect.

23 Q. Now, please look at the Merrick labels on Schedule
188 G and say if they are fair samples of the labels you have seen on the market and equally good as those which you have seen.

A. Yes; I think that some of those are as good as any I have seen.

24 Q. Do you know of any spool heads and labels of any other manufacturers than Merrick which, in your opinion, would be likely to be mistaken for Coats'?

A. Taking the embossed head in connection with the label, I do not.

Cross-examined by Mr. WITTER:

25 X Q. Leaving out of consideration the embossed head, what other labels and spool heads do you think might be so mistaken for Coats'?

Witness is shown Defendants' Exhibits No. 1, No. 2, No. 3, No. 4, No. 5, and No. 6.

A. I do not think that either of these labels would be taken for J. & P. Coats'. I do not think there is the slightest chance of it.

The exhibits are now removed from witness.

26 X Q. You mean leaving out of consideration the embossment on the head of the spool?

A. I supposed I had disposed of Merrick's before; what I meant to say is, the most likely to be taken for Coats' of those shown me.

27 X Q. Which of the labels on the six exhibits is the least likely to be mistaken for Coats'?

Witness examines the exhibits again.

A. The mile-end least likely; the Willimantic next. There is not much to choose between Orr and McNaught and Geo. A. Clark's.

28 X Q. They are all six black and gold, are they not?

189 A. No; I think that No. 3, mile-end, is black, silver, and gold.

29 X Q. With that exception they are all black and gold, are they not?

A. Yes.

30 X Q. And the mile-end has a black and gold centre and a black and gold ring concentric with that centre, has it not?

A. Yes; but between those are the silver circles, which alter its appearance.

31 X Q. Do you think the silver upon that label is so prominent as that a purchaser would not be likely to mistake the thread for Coats'?

A. I do.

32 X Q. Why is John Clark, Jr., & Co. printed on that label?

A. Because they were the manufacturers for over sixty years. Then they formed an incorporated company, transferring the labels and trade-marks to the Clark Mile End Spool and Cotton Company.

33 X Q. Was it through John Clark, Jr., & Co. that the original reputation of the thread was gained?

A. Yes, sir.

34 X Q. And is that name used to indicate to the public the original manufacturers?

A. It is to indicate that this thread was known under that brand of mile-end.

35 X Q. You mean in connection with the words "mile-end, Glasgow," the words John Clark, Jr., & Co. indicate to the public the manufacturer and good reputation of the thread?

A. Yes, sir; I might add that the Clarks hold a majority of the stock still.

36 X Q. For how many years have you been familiar with the use upon 200-yard six-cord thread of black and gold labels upon which is printed the name of the maker, the number of the thread, and the length of the thread? And mention the names of the different makers. I mean both in this country and abroad.

190 Objected to as incompetent and immaterial and as not cross-examination, and special objection made to that part of the question which relates to use abroad for the reasons above stated.

A. Well, I can't remember those abroad; it is thirty years since I left. I don't know that I could speak positively, except the more recent ones, those in use now, the O. N. T., Willimantic, Merrick (and a cotton that is now out of use), Orr & McNaught's, and one that preceded the latter, John Dick & Sons. I think theirs was black and gold. I can't think of any other.

37 X Q. Did you ever know of any Semples'?

A. Yes; I omitted that. It is not much in the market now.

38 X Q. Did you know of Kerr's thread with such a label?

A. Yes.

39 X Q. Now state how long you have known of the use of such a label in each of the cases above given.

Same objections as to the X Q. 36.

A. O. N. T. about twenty years—that is, in this country, of course; Willimantic, I should think, at least fifteen or twenty years; of course, I am speaking from memory and cannot be quite sure; Orr & McNaught's—well, that has been out of use for ten years; I do not think it was in the market for over fifteen or twenty years. John Dick & Sons were only in the market for three or four years; then they failed. They failed twenty-five years ago. Semples—I really don't know how long they were in the market; I should think it was twelve or fifteen years since I knew that label first. They failed, too.

40 X Q. By the Semples and Kerr labels you mean those shown on the two spools herewith produced, do you not?

A. Yes, sir.

Defendants' counsel puts the two spools in evidence, and
191 they are marked respectively Defendants' Exhibit No. 16, Samples No. 30, and Defendants' Exhibit No. 17, Kerr's No. 50.

41 X Q. How long have your people used the black and gold label with silver added, as shown on the Defendants' Exhibit No. 3?

A. Well, how much longer than 40 years I don't know, but of my own personal knowledge for 40 years. There have been slight alterations in the lettering of it, but not in the general appearance.

42 X Q. What do the words "six-cord" upon that label mean?

A. That the thread upon that spool is made of six ply.

43 X Q. And what do the figures "50" mean? Is that to enable the public to know what number of thread is wound upon the spool?

A. It is.

44 X Q. And do the words and figures "200 yds." indicate to the public the amount of thread wound upon the spool?

A. Yes, sir.

45 X Q. I find upon a box of your thread of No. 110 the words, "All numbers six-cord to 100's," and I also find upon the inside flap of said box the words, "All numbers warranted six-cord from 8 to 100." I presume that notice is so found upon all your boxes containing 200-yd. thread of a number higher than 100. Am I correct?

A. Yes; there is no doubt that is so.

46 X Q. What information do those notices which I have quoted convey to the public? State it in your own words, and state also whether the information is not correct.

A. It is intended to convey what it says; the information, it was put on shortly after we adopted the plan of making six-cord from 8 to 100 to make an advertisement of the fact. This is not the label that is now in use.

192 47 X Q. How does the label now in use differ from the one before you?

Objected to as incompetent and not the best evidence.

A. I think the bottom label has the words, "All numbers warranted six-cord from 8 to 100," but on the top I think it has "best six-cord" only, without the other words.

Answer objected to as incompetent.

48 X Q. The words, "All numbers six-cord to 100's," express the fact as it actually exists, is not that so?

A. Yes.

49 X Q. When did you begin to make your thread six-cord from 8 to 100?

A. I think it must be about 15 or 18 years ago; it might be a little longer or shorter; I am not sure, since all these numbers were made six-cord. Prior to that time they were six-cord up to 40, and then we tried for a little time up to 60, and then changed up to 80, and then up to 100 after that.

50 X Q. The practice of making more and more of the Nos. 8 to 100 six-cord is a practice that has been a part of the growth of thread manufacture with you, has it not?

Objected to as misleading if it is intended to refer to any numbers higher than 100.

A. Yes; caused by the requirements of sewing machines.

51 X Q. Please explain exactly what you mean by that.

A. Sewing machines require a finer thread than was before used by hand-sewing, and the three and four cords of the fine numbers from 100 down were not strong enough for machine use.

193 52 X Q. And so you made them six-cord that they might be strong enough for machine use. Is that so?

Objected to as not being cross-examination.

53 X Q. Is not No. 110 used upon sewing machines to-day?

Same objection.

A. It can't be to any extent on account of the insignificant quantity that is sold, and if it is it must be on very fine material which does not require strength.

54 X Q. How did you arrive at the percentage which the use of

the high numbers of your product bears to the use of those below 100?

A. I looked through our sales for one year.

55 X Q. How many dozens, on an average, per week of the numbers above one hundred did you find that you sold?

A. I would rather not state that, as the amount of our sales could be easily calculated from that.

56 X Q. In answer to question 11 you say these high numbers are used for very fine material. Please state what you mean by "very fine material."

A. Well, there is one purpose: For darning very fine laces, and I am not familiar with the names of the fine fabrics that ladies wear.

57 X Q. You refer, generally, to fine textile fabrics, do you?

A. Yes, sir.

58 X Q. And do you think the use of such thread is limited to such fabrics?

A. Yes.

59 X Q. Referring to question 18 and answer, who, at the time referred to, called your attention to the thread of the Merrick Company?

A. I heard of it through some of our salesmen, who told me of it being in the market.

60 X Q. Just as you would be likely to hear of any other manufacture?

194 A. Yes, sir.

61 X Q. If spools of the Merrick and of the Coats thread of the same number differed from each other in size and shape as much as the two spools which I now show to you at a distance of across the table, do you not think that the difference in size and shape would be sufficient to prevent purchasers who were familiar with one from mistaking the other for it?

Objected to as not cross-examination. The counsel for the defendant makes the witness his own on this point.

A. Well, I don't think so, because I would immediately conclude that one was a coarser number than the other from this distance.

62 X Q. What number would you conclude the taller spool to be, assuming that the shorter one was No. 60?

Same objection and notice.

A. Probably about 50 or 46.

63 X Q. Please now examine the two spools of thread referred to and state of what number and manufacture they are respectively.

Same objection and notice.

A. The longer one is Merrick's No. 60 and the shorter J. & P. Coats' No. 60.

64 X Q. Do you know of any such difference of length of spool existing between Coats and any other maker?

Same objection and notice.

A. I can't say that I have ever examined them closely for that. I know that there is more or less variation in length amongst them all.

The latter remark is not called for by the question.

195 65 X Q. If you think that there is any such difference in length between any two makers won't you state which ones?

A. I think I answered that question already—that I had not examined them sufficiently in that regard to be able to say.

66 X Q. About what is the relative difference in cost of making three-cord and six-cord thread of the same number? State approximately.

Same objection and notice.

A. That belongs to the manufacturing department entirely. Being only the selling agent, I am not familiar with the cost.

THOMAS RUSSELL.

Sworn to before me—

THOMAS HUNT,
Special Examiner.

Adjourned to Thursday, the 17th December, 1885, at 11 o'clock in the forenoon.

NEW YORK, *December 17th*, 1885.

Met pursuant to adjournment.

Present: Counsel as before.

JOHN W. FARRINGTON, a witness on behalf of the complainant, having been duly sworn, deposes as follows:

1 Q. What is your name, age, residence, and occupation?

A. John W. Farrington; age, thirty-one years; 251 West Fourteenth street, New York city; salesman with Auchincloss
196 Brothers.

2 Q. Are you connected with the spool-cotton business; and, if so, for now long?

A. Yes; five years.

3 Q. What have been your duties during that time?

A. The first six months I was in the store getting familiar with the stock; since have been out in the city drumming the retail trade, large and small.

4 Q. Are you familiar with the different brands and styles of spool cotton sold in this country?

A. Yes, sir.

5 Q. Please state the names of the different manufacturers of spool cotton now on sale in this country with which you are familiar.

A. J. & P. Coats, George Clark, John Clark & Co., Willimantic, Merrick's, Kerr's, Brooks'.

6 Q. Have you produced here to-day a set of samples showing the character of spools, spool heads, and labels used by the different manufacturers in the sale of their ordinary white spool cotton?

A. Yes, sir; as near as can be found, with the exception of Brooks'.

The box of samples produced by witness is here offered in evidence and marked as Exhibit Comparative Samples.

7 Q. In the box you have produced what kind of spools does row No. 1 contain?

A. George A. Clark's spools.

8 Q. I notice that George A. Clark's spools are all white or natural-colored wood. Does he use the same white spools with all his spool cotton—white or black?

A. Yes, sir.

9 Q. Please state whose spool cotton is exhibited in the box, row No. 2.

A. Kerr & Co.

10 Q. I notice there are two styles of spools and labels in row No. 2. Why is that?

A. The black spools with blue, white, and gold labels are the old-style spool. The yellow spool with the blue, white, and gold
197 label is the old spool, and, I think, black thread is only wound on it. The long white spool with gold and black label is their latest design.

11 Q. State how recently Kerr & Co. have changed from the black spools with the blue, white, and gold labels to white spools with gold and black labels.

A. Within one year.

12 Q. Please state whether Kerr & Co. use any different colored spools from those used in row No. 2 for their colored or black thread.

A. Not to my knowledge.

13 Q. Whose spools are those shown in row No. 3?

A. John Clark, Jr., & Co.

14 Q. I notice that John Clark, Jr., & Co. white thread is wound on black spools. Please state whether for black or colored thread they use any other colored spools than that.

A. For white thread they use black spools and for black thread they use white spools. I never noticed particularly on the other colors of thread the color of the spool.

15 Q. Whose thread is exhibited in the fourth row of the samples?

A. Willimantic Linen Co.

16 Q. What colored spools do the Willimantic Linen Co. use with their different threads?

A. Black spools for white thread, white spools for black and colored threads.

17 Q. Whose make of thread is exhibited in samples row No. 5 in box?

A. Merrick Thread Co.

18 Q. What colored spools do the Merrick Thread Co. use with their different threads?

A. White spools only, for both black and white thread.

19 Q. Whose make of thread is exhibited in row No. 6 in box of samples?

A. J. & P. Coats.

20 Q. What colored spools do J. & P. Coats use with their different threads?

A. White spools only, for black and white thread.

198 21 Q. I notice that compartment No. 7 contains a number of specimens of spool cotton. State what those are.

A. They are samples of thread showing the result of ordinary wear in stock.

22 Q. State what the small spools in compartment No. 8 are.

A. The final numbers of George Clark, John Clark, Jr., & Co., Willimantic Linen Co., and J. & P. Coats.

23 Q. Please state what the spools contained in compartment No. 9 are.

Objected to by defendants' counsel as immaterial.

A. Merrick's long lengths.

JOHN W. FARRINGTON.

Sworn to before me this 17th day of December, 1885.

THOMAS HUNT,
Special Examiner.

Adjourned to Wednesday, December 23, 1885, at 11 o'clock.

199 NEW YORK, *Dec.* 23, 1885.

Met pursuant to adjournment.

Present: Mr. Betts, counsel for complainant-.

JOHN W. FARRINGTON, recalled for the complainant-, deposes as follows:

1 Q. In your answer to the sixth question of your deposition of Dec. 17th you stated you produced samples showing the character of spool heads and labels used by the different manufacturers, except Brooks, on their ordinary white spool cotton. Have you to-day produced samples showing the character of spool heads and labels used by Brooks?

A. I have.

2 Q. Please state whether you have arranged Brooks' spool cotton in the box of samples which was offered in evidence at last hearing; and, if so, in what compartments.

A. Yes; in Nos. 10 and 11.

3 Q. I notice that there are two styles of Brooks' cotton; what are those two styles?

A. The white spools, with blue and white labels, are their *glacé* cotton with hard finish; the black spools, with red and gold labels, are their soft-finished cotton.

4 Q. Are all of the specimens of spool cotton that you have now referred to and of which you have produced samples, to wit, Coates',

George Clark's, John Clark & Co.'s, Willimantic, Merrick's, Kerr's, & Brooks', with the exception of the fine or high numbers in the compartment No. 8 of the box "Exhibit Comparative Samples," six-cord cotton?

A. Yes.

5 Q. I now call your attention to certain spools of Merrick's cotton with blue, red, and white labels, which I place in compartment 12 of the box "Exhibit Comparative Samples," and ask you if you recognize these spools; and, if so, what they are.

A. They are Merrick's three-cord cotton.

200 6 Q. How long have you known the Merrick's three-cord cotton with those spools and labels?

A. Five years.

7 Q. Were these the common spool heads and labels used by Merrick before you knew of the introduction by Merrick in the market of the black and gold labels and the embossed spool heads exhibited in compartment No. 5?

A. Yes.

8 Q. Is Brooks' the oldest manufacturing spool cotton?

A. Yes; the oldest in the market.

JOHN W. FARRINGTON.

Sworn to before me this 30th day of December, 1885.

THOMAS HUNT,
Sp. Examiner.

201 CITY AND COUNTY OF NEW YORK, }
Southern District of New York. }

I, Thomas Hunt, a notary public in and for the city and county of New York and acting as special examiner in taking the testimony on behalf of complainants in the suit of Sir Peter Coats *et al. vs.* Merrick Thread Co. *et al.*, now pending in the United States circuit court for the southern district of New York, do hereby certify that on the days and at the places named in the annexed depositions the counsel and witnesses named in said deposition appeared before me; that the said witnesses were duly sworn by me to tell the truth, the whole truth, and nothing but the truth in the matters in controversy in the said suit; that their testimony was written down either by me or my clerk in my presence and in the presence of the said witnesses and counsel and read over to the said witnesses and signed by them in my presence; that the exhibits introduced in said depositions have been marked by me for identification, and that I am not of counsel for either party or in any way connected with the said matters in controversy in said suit.

Dated New York, Dec. 23d, 1887.

THOMAS HUNT,
Notary Public.

202 Circuit Court of the United States for the Southern District of New York, in the Second Circuit, In Equity.

Sir PETER COATS *et al.*
vs.
THE MERRICK THREAD COMPANY and HERBERT F. PALMER.

DECEMBER 21, 1887—11 a. m.

Met pursuant to notice.

Present: Samuel R. Betts, Esq., counsel for complainant-; William C. Witter, counsel for defendant-.

Continuation of testimony for complainant-taken under and pursuant to sixty-seventh rule in equity, &c., before Thomas Hunt, Esq., special examiner.

Defendants' counsel suggests that this testimony be headed testimony in rebuttal on the part of complainants, taken under order of court entered December 5th, 1887, and objection is here seasonably made to any testimony which is not properly in rebuttal of defendants' case, and to save time complainants' counsel consents that this general objection may here be made without the necessity of entering or repeating it to specific questions or answers.

JOHN B. CROSBY, a witness produced on behalf of com-
203 plainant-, and having been first duly sworn, deposes and says in answer to questions by complainants' counsel:

1 Q. What is your name, age, residence, and occupation?

A. John B. Crosby; age, 37; residence, Detroit, Michigan. I am a buyer and manager of notion department of Root, Strong & Company, of Detroit, Michigan.

2 Q. State what the business of Root, Strong & Company is and how long you have been connected with them.

A. Wholesale dry goods and notions; a little over eight years.

3 Q. State how far back your experience in buying or selling spool cotton dates.

A. Twenty-two years.

4 Q. What makes of spool cotton have Root, Strong & Co. dealt in since you have been with them?

A. J. & P. Coats, George A. Clark, John Clark, Jr., & Co., Willimantic Linen Company, Merrick Thread Company.

5 Q. Have they dealt in J. & P. Coats' thread since you first went with them, about 8 years ago?

A. Yes, sir.

6 Q. About when did they first begin to deal in Merrick's thread?

A. Between two and three years ago, I think—about three years.

7 Q. State what your duties were in Root, Strong & Company's during the period before they began to deal in Merrick's thread.

A. Traveling salesman.

8 Q. Whereabouts did you travel for them during that period?

A. Most of the time in the northwestern part of the State of Michigan.

9 Q. Can you state when and where, as such traveling salesman, you first met with Merrick's thread?

A. Muskegon, Michigan; Shelby, Michigan. Those are the only two places that I am positive of. It was about a little over two years ago.

204 10 Q. With what firm at Shelby, Michigan, did you see this Merrick's thread?

A. Paton & Andrus.

11 Q. Did you have any conversation with a member of that firm at that period in regard to the Merrick thread and their dealing in it; and, if so, what was said?

Further objected to as hearsay.

A. I asked them why they put in new thread or Merrick's thread. They said because it was a good deal cheaper, and that it looked so much like Coats' that their customers would not notice the difference.

Same objection.

12 Q. On this same trip, on which trip you say you first met with Merrick's thread, did you make inquiries of any other dealers about it and why they introduced it; and, if so, what reasons were given?

Further objected to as calling for hearsay.

A. Yes, sir; the same reasons were given.

Same objection.

13 Q. State whether you remember the trip distinctly for any special reason.

A. Yes, sir; I remember it because it was then I first met with Merrick's thread—the first I heard of it.

14 Q. Of whose thread does your firm of Root, Strong & Co. sell the most?

A. J. & P. Coates'.

15 Q. Have you ever made a test between J. & P. Coates' thread as to which was the better; and, if so, with what result?

A. Yes, sir; Coates' is the stronger by that test.

205 16 Q. Since you began to sell the Merrick's thread have you sold it to any extent; and, if so, to what extent?

A. I think three or four thousand dozens a year. It may be more, it may be less. I couldn't say more than it is my impression.

17 Q. State whether or not those sales have been made to customers who had formerly bought Coates' thread or not.

A. Some of them were; yes, sir.

18 Q. Do your firm sell thread only at wholesale?

A. Yes, sir; at wholesale only.

This entire deposition is here seasonably objected to as not properly in rebuttal, as merely in corroboration of the complainants'

prima facie case, and notice is given that a motion will be made before the court to strike the said deposition from the record, and also to direct the complainants' counsel to limit himself to rebuttal testimony, pursuant to the order of December 5th, 1887.

Cross-examination *de bene esse* and without waiving the objection and notice heretofore made:

19 X Q. You were asked by question 11 whether you had any conversation "with a member of that firm"—that is, Paton & Andrus, of Shelby, Michigan—"at that period in regard to the Merrick thread and their dealing in it; and, if so, what was said?" and you answered, in part: "I asked them why they put in new thread, &c., or Merrick's thread. They said because," &c. Which member of the firm of Paton & Andrus was it that said what you have reported in your eleventh answer?

A. I don't remember.

20 X Q. How many members were there in that firm at that time and what were their names?

A. Just two, as far as I know.

21 X Q. Can you give their full names?

A. No, sir; I can't.

206 22 X Q. Just exactly where did the conversation reported in your answer to question 11 take place?

A. In their store, at Shelby, Michigan.

23 X Q. I mean in what part of the store, and who were present besides yourself and one of the firm?

A. It was about the centre of the store. I couldn't say whether there was any one else present or not. My impression is one of the clerks was there.

24 X Q. So that, as you now state it, you and one member of the firm of Paton & Andrus and perhaps a clerk were all that were present. Am I correct?

A. As near as I can remember; yes, sir.

25 X Q. At what number, in what street, are Paton & Andrus located at Shelby, Michigan?

A. They are on the main street. I don't know whether the store is numbered. I don't know whether the street is named or not.

26 X Q. Can you give any personal description of the member of the firm of Paton & Andrus with whom you had the conversation referred to or of the clerk about whose presence you have an impression which will enable the member to be identified with whom you think you had the conversation, or which will enable the clerk to be identified?

A. I can describe both of them, but the clerks I don't remember.

27 X Q. Is that as full an answer as you can make to the last question?

A. Yes, sir.

28 X Q. Question 12 and answer read as follows: "On this same trip, on which trip you say you first met with Merrick's thread, did you make inquiries of any other dealers about it and why they introduced it; and, if so, what reasons were given? Answer. Yes,

sir; the same reasons were given." Can you now remember the name and address of any such "other dealer"?

A. No, sir.

29 X Q. What was your business on the trip referred to to northwestern Michigan?

A. Selling dry goods and notions.

207 30 X Q. Including J. & P. Coats' thread?

A. Yes, sir.

31 X Q. Was that your business in the various stores that you have referred to?

A. Yes, sir.

32 X Q. What thread have you referred to throughout this deposition; has it been spool thread known as 200-yard six-cord thread?

A. Yes, sir.

33 X Q. Why did you speak of Merrick's thread as "new thread" in your 11th answer?

A. Because I never had seen it before.

34 X Q. How did you know it was Merrick's?

A. I saw the name on the cabinet that stood on the counter.

35 X Q. Did not you take the spools out and examine them; how as to that?

A. Yes, sir; I took the spools out—one spool or two—looked at it.

36 X Q. Did you see the Merrick name on the label?

A. Yes, sir.

37 X Q. You say in answer to question 15 that you made a test between J. & P. Coats' thread and the Merrick thread to see which was the better, and that you found the Coats thread stronger by that test. Do you think that strength is a test of superiority of thread?

A. Yes, sir.

38 X Q. What was the test you made?

A. With a machine made for that purpose.

39 X Q. Where did you make the test?

A. In Root, Strong & Co.'s store.

40 X Q. What kind of a machine was it; describe it fully?

A. It was a dial with numbers representing pounds. By attaching thread to the lever and pulling against a spring the pointer was left on the dial to the point where the thread broke, or opposite the number of pounds at which the thread broke.

41 X Q. Have you preserved a record of that test; if so, will you please produce it?

A. No, sir; there was no record made.

208 42 X Q. Can you give any more full or complete description of that test?

A. No, sir; it was made to satisfy myself as to the strength of the two threads.

43 X Q. What was the number of thread that you tested, if you remember?

A. I don't remember, but we usually test from thirty to fifty.

44 X Q. Do you remember how many spools of each make that you tested on that occasion?

A. I don't think I tested but one each.

45 X Q. When was this test made?

A. Between a year and a year and a half ago.

46 X Q. Who was present beside yourself?

A. Not any one.

47 X Q. What do you mean by cabinet with the Merrick name upon it?

A. Case with drawers containing the Merrick thread sent out by the Merrick Company to introduce their thread. It is done for the convenience of the retailer.

48 X Q. And show whose thread it is?

A. Yes, sir.

49 X Q. Do you understand it to be one among many means adopted by the Merrick Thread Company to advertise their thread and make it known to the world? By many means I mean cards, signs, counter wrappers, &c.

Objected to as immaterial.

A. Yes, sir.

50 X Q. In answer to Q. 14 you say that your firm of Root, Strong & Co. sell the most of J. & P. Coats' thread. State the relative amount per year, as near as you can without referring to books, of the sale of Coats' and of Merrick's thread that you have referred to.

A. About seven to one in favor of Coats.

Redirect examination by Mr. BETTS:

50*a* Re-D. Q. You say in answer to cross-question 26, "I
209 can describe both of them." Do you refer to the members of the firm by that, or to whom?

A. To the members of the firm.

51 Re-D. Q. Please describe them.

A. Mr. Paton is a man about five feet eleven, weighing about 185 pounds, light complexioned, light hair, and I think at that time wore a full beard. Mr. Andrus is a man of about five feet ten, weighing about 145, dark hair, fair complexion, and dark mustache.

52 Re-D. Q. Please state whether that trip on which you visited the firm of Paton & Andrus and had the conversation you mentioned in your direct examination was the last you made while in the employ as travelling salesman of Root & Strong.

A. I think it was, although I couldn't say positively without referring to books.

53 Re-D. Q. Can you mention any other places than Shelby where you saw Merrick's thread on this trip or any other persons with whom you talked about it as a new thread to you?

Further objected to as not proper redirect.

A. Yes, sir; I saw it at Muskegan, Michigan, in the store of W. D. Hardy & Co.

54 Re-D. Q. Can you mention any other?

A. No, sir.

JOHN B. CROSBY.

Subscribed and sworn to before me this 21st day of December, 1887.

THOMAS HUNT,
Special Examiner.

Adjourned to 2 p. m.

2 P. M.

Examination adjourned to December 22d, at 11 a. m.

210 NEW YORK, *December 22d*, 1887—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

ALBERT R. LOGIE, a witness called on complainants' behalf, after being duly sworn, deposes and says:

Examined by Mr. BETTS, for complainant:

Defendants' suggestion and objections made at the beginning of these proofs, on December 21st, are here seasonably repeated, together with complainants' consent.

1 Q. What is your name, age, residence, and occupation?

A. My name is Albert R. Logie; age, 40; occupation, buyer; residence, 55 Clifton place, Brooklyn.

2 Q. With what firm are you connected, and for how long have you been with them, and in what capacity?

A. Root, Strong & Co., of Detroit, Michigan; six years; as buyer of general merchandize in dry goods.

3 Q. Does that cover the buying and selling of spool cotton?

A. It does.

4 Q. For how long have you been familiar with the different brands of spool cotton in the trade?

A. Twenty years.

5 Q. State which, in your opinion, is the better thread, Coats' or Merrick's. These questions refer to six-cord 200-yard spools.

A. Coats' thread.

6 Q. Have you ever made any tests, comparing Coats' thread with Merrick's; and, if so, what were they and what was the result?

A. I have made several with an ordinary thread-testing apparatus, and recollect that the strength shown by the Coats' thread was greater than that of Merrick.

211 7 Q. Did you have anything to do with introducing the Merrick thread to the firm of Root, Strong & Co.? And, if so, state what.

A. I bought. I made the first purchase of the goods for them about two years ago, or in the year 1885. I bought it against the wish of Mr. Root, as they didn't wish to increase the amount of goods carried in that line.

Defendants' counsel requests the witness to add to his answer what he has said since the question was put, to the effect that there was nothing against the Merrick thread, and requests the examiner to note that while the above request was being dictated complainants' counsel said: "Never mind; you just answer my question."
The examiner makes the note requested.

Complainants' counsel requests the examiner to state if he has put down the answer of witness as far as he heard it.
The examiner states that he has.

8 Q. What was the inducement to the firm of Root, Strong & Co. in taking hold of Merrick's thread at the time you speak of?
A. Well, I can't answer that question accurately, and therefore I can't answer that question.
9 Q. Can you tell why Root, Strong & Co. did introduce Merrick's thread at that time?
A. To have a cheaper thread.
10 Q. State what spools, in your opinion, bear the closest resemblance to the Coats' spools in labels and appearance. I refer to spool cotton in the United States market.

Further objected to as leading.

A. The Merrick's spools.
212 11 Q. In your opinion is the resemblance of the Merrick spools and labels to the Coats' such as is calculated to mislead consumers?

Further objected to as leading and indefinite.

A. Mislead them as to what?
12 Q. So that retailers could substitue Merrick's for Coats' without being readily detected unless the customer was paying special care.

Same objection.

A. I think so.
13 Q. You speak of Root, Strong & Co. introducing Merrick's thread to have a cheaper thread; please state whether the similarity of the Merrick's labels to Coats' which you have mentioned, in your opinion, has made the Merrick thread more salable than if its labels were entirely dissimilar.

Same objection, and further objected to for the reason that the question is not warranted by the issues in the case.

A. I believe so, and I certainly would buy Merrick's because of its similarity to Coats' in preference to a thread equally as good, at

the same price as Merrick's, but with very distinctive boxes and labels.

The last part of the answer, beginning with "and I certainly would buy," &c., is objected to as volunteered by the witness.

14 Q. For what reason would you do this?

A. Because I believe that the similarity of label is a value to it as a selling quality. I refer particularly to the trade of Michigan, with which I am familiar.

The objections and notice made at the end of the direct examination of witness John D. Crosby, taken Dec. 22, 1887, are here repeated.

213 Cross-examination *de bene esse* without waiving objection and notice before made:

15 X Q. In answer to question 6 you speak of testing thread, with the result that Coats' showed greater strength than Merrick's. Do you regard strength in the 200-yard thread as the best test of the superiority of the thread?

A. It is one of the very important qualities of the thread.

16 Q. Can you mention any quality that is of greater importance? If you can, please do so.

A. Not intrinsically.

17 Q. How as to extrinsically.

A. The selling quality.

18 Q. What do you mean by that?

A. The value of the thread to the merchant. An article that won't sell has no value.

19 Q. What quality comes next?

A. In Michigan Clark's mile-end thread is preferred next to Coats'.

20 Q. Which next?

A. The Willimantic.

21 Q. And which next?

A. In my merchandizing experience in Michigan I have sold but the three foregoing and Merrick's.

22 Q. How as to George Clark's in Michigan?

A. The George Clark O. N. T. cotton, so far as I know, has but a very limited sale in Michigan.

23 Q. How do you account for this?

A. I do not account for it.

24 Q. Do you know of the George Clark concern making such effort to introduce their thread in Michigan as they have in some other parts of the country?

Objected to as immaterial.

A. I don't know what they have done in other parts of the country.

214 25 Q. Do you know what they have done in Michigan?

Same objection.

A. They have never approached me on the subject of introducing their cotton.

26 Q. Do you mean to be understood that you do not know what efforts they have made to introduce their 200-yard 6-cord thread into Michigan?

Same objection.

A. I have never had any conversation with them, directly or indirectly, on the subject of the purchase of their spool cotton—that is, the O. N. T.

27 Q. Or any knowledge or experience as to what they may have done to introduce their thread into Michigan?

Same objection.

A. I have never had any conversation with them on the subject of thread.

28 Q. And so you don't know of any efforts being made by them to introduce their thread into Michigan. Can you say that?

Same objection.

A. I have never spoken to them about it.

29 Q. Can't you answer whether you have or have not any knowledge of efforts made to introduce their thread into Michigan?

Same objection.

A. I consider that I have fully answered the question.

30 Q. May the court assume that you have no such knowledge?

Same objection.

215 A. I do not consider that my language admits of any assumption.

31 Q. That's the way it seems to me, and that is why I have been seeking to have you answer the simple question, whether you have any knowledge of efforts made by the George Clark concern to introduce their thread into Michigan. Will you please answer that definite question?

Same objection.

A. I repeat that I have had no conversation with the Clark people on the subject of the purchase and sale of their thread, either directly or indirectly, nor have I been approached on the subject in any manner.

32 Q. In what respect do you think the Merrick label resembles the Coats?

A. In such a close general resemblance that makes it difficult to particularize—difficult for me to particularize, at least.

33 Q. In what respects does the Merrick label resemble the Coats

in which the George Clark label and the Willimantic label do not resemble the Coats?

A. The label, lettering, and general resemblance of the Merrick, at a short distance, may be readily mistaken for the Coats, whereas, either of the others mentioned are readily distinguished from the Coats. I speak now of the inexperienced eye.

34 Q. How are the two latter readily distinguished from the Coats? What is it that makes the distinction so easy in your view?

A. The dissimilarity.

35 Q. Just what dissimilarity do you refer to—in what?

A. Particularly in color and lettering.

36 Q. What is the peculiarity in color that makes the Willimantic and the George Clark so dissimilar from Coats?

A. The Willimantic—the difference between white and yellow.

216 37 Q. Which is white and which is yellow?

A. If you will show me the boxes I will tell you what I mean.

38 Q. Are you talking about the boxes?

A. I supposed you referred to the boxes and labels.

39 Q. And labels on the boxes?

A. Yes, sir; I have in my mind the arrangement of the stock on the shelves, as kept by jobbers, in answering the foregoing questions.

40 Q. And the labels you have been referring to have been labels appearing on what part of the boxes?

A. Necessarily the ends, for the boxes are so arranged in the stock that the ends necessarily show the number and color of the box.

41 Q. Do you remember what the lettering is on the labels that you have been talking about?

A. I do not trust myself to particularize.

42 Q. But the Willimantic and George Clark you think are a white lable, and box if I understand you, and the Merrick is of a color of label and box more nearly resembling the color of the Coats label and box. Have I expressed your views fairly?

A. You have not.

43 Q. Please express your views fairly.

A. The Clark box is white with black lettering, the Willimantic is in a tinted box with black lettering, and the Merrick is very nearly like the Coats.

44 Q. Won't you point out on a Coats six-cord sample No. 14, "T. H., Sp. Ex'r," the label which you think, and which you have been speaking about, is resembled by the Merrick?

A. I have said that if you will show me numbers of the same I will tell you what I mean. I mean the same numbers of the two different makes of thread, Merrick's and Coats'.

45 Q. Can't you point out the box label which, in answer to question 40, you say appears necessarily on the ends, and which you have been testifying you think resembles the Merrick?

A. I mean the end label; there is but one.

217 46 Q. What does it say on the end label of the exhibit handed you as above?

A. "100—white—J. & P. Coats."

47 Q. What was your business before you became a buyer for Root, Strong & Co.?

A. Salesman with Dale, Dutcher & Co., wholesale dry goods.

48 Q. And what previous to that?

A. Dunham, Buckley & Co., as salesman.

49 Q. And previous to that?

A. Still a salesman; with Carlton Ayres, wholesale house; out of business.

50 Q. Have you always been engaged in the wholesale dry-goods business as distinguished from retail?

A. Yes, sir; for twenty years.

51 Q. And what was your occupation before that—before you went into the wholesale dry goods?

A. Law student.

52 Q. Haven't you ever sold spool thread by the spool over the counter?

A. I have.

53 Q. Where and when?

A. When I was on the road as travelling salesman.

54 Q. Travelling salesman for whom?

A. Carlton Ayres, Dale, Dutcher.

55 Q. Explain what you mean by selling spool thread by the spool over the counter while travelling salesman for these houses.

A. Many times, while stopping at a town, finding merchants busy, I have assisted them in selling goods when I could be helpful, for the sake of gaining their good will and for the sake of the experience it gave me. I've done it many a time.

56 Q. Search has been made for the box of Merrick thread which you asked to see and which, as appears in the deposition of Stephen Hoff, Q. 5, were marked "Exhibit Specimens Defendants' 6-Cord Thread 1, 2, 3, 4," but they do not seem to be at hand. Can you state, from recollection, what the lettering is upon the end of Merrick boxes of thread corresponding in number with the Coats

218 box shown you and which has caused you to say, in answer to question 11 and subsequent question, that you think the Merrick label is like the Coats?

A. I can recognize, but cannot describe.

57 Q. Is the Merrick label similarly situated on the end of the box?

A. My recollection is that there is a strong general resemblance.

58 Q. Are both labels that you referred to on the end of the box? Is that your recollection?

A. I think so, but have not seen a Merrick box for nearly a year.

59 Q. So far as you do recollect it, does the Merrick label referred to give the number of the thread, its color, and the name of the maker, or can't you be sure as to that?

A. I cannot be sure.

60 Q. What is the arrangement of the stock on the shelves of the jobber that you have spoken of in answer to question 39?

A. With us the numbers are arranged according to sequence, with the end showing the number out, divided into white and black.

61 Q. Do you keep the different makers' thread in different piles or on different shelves?

A. The thread stock is all kept together in the same manner of arrangement, but each make is kept separate and distinct from the other.

62 Q. Why are they so arranged that the end of the box bearing the label indicating make, color, and number is outward?

A. For convenience in selling the goods and filling orders for the same the goods are sold by make and number.

63 Q. That is to say, having an order, for example, for twenty dozen Coats', white, No. 40, you are enabled, without confusion, to fill the order. Is that what you mean?

A. Yes.

64 Q. Are your orders generally received in substantially
219 in that manner—that is to say, for a certain amount of certain numbers of certain colors of a certain maker?

A. The customer or salesman ordering thread gives the maker, quality, and number—*e. g.*, "Send me Coats' thread, 20 doz. white, 40;" consequently in filling that order it is of great advantage to be enabled to immediately select the goods.

65 Q. What proportion of the thread Root, Strong & Co. sell is Coats' and what proportion Merrick's, as near as you can estimate it?

A. I think the sales of Coats' are double those of Merrick, but Mr. Crosby knows and I do not.

66 Q. Did you ever know or hear of a thread called the Orrs & McNaught 200 — spool thread in this country?

Objected to as not responsive to the direct examination.

Question withdrawn.

67 Q. Is Orrs & McNaught thread one of the different brands of spool-cotton that you have known or heard about in the trade?

A. I have heard of it; have never seen it, and do not consider it of importance to the jobbing interest at the present time. I refer to Michigan.

Redirect by Mr. BETTS:

68 Q. In speaking of the Merrick spools and labels as being similar to the Coats, did you mean the labels on the spools as well as on the boxes? I refer particularly to questions 11, 12, 18, and 14.

Question further objected to because the witness has clearly stated on cross-examination that he has referred to the label on the end of the box, being the label coming before the eyes of the jobber.

Complainants' counsel says that the above statement is a
220 mere inference of defendants' counsel, and that the question

the witness is now asked refers to questions asked on his direct examination.

Counsel for complainant- then reads questions and answers 11, 12, 13, and 14.

A. I refer to the thread as being similar in spool, box, labeling, color, and each point that goes to make up similarity.

Recross by Mr. WITTER:

69 Re-X Q. How does the spool of Merrick resemble Coats' spool any more than the George Clark spool or any other white spool?

A. I don't know that I can answer any better than by saying that it's more like it. I speak from recollection.

70 Re-X Q. And you can't recollect any detail that makes the Merrick look more like the Coats or the George Clark or any other white spool?

A. No; my recollection is not distinct.

ALBERT R. LOGIE.

Subscribed and sworn to before me this 22d day of December, 1887.

THOMAS HUNT,
Special Examiner.

Defendants' counsel states that the testimony of the witnesses Crosby and Logie is in no sense rebuttal testimony; that it is evidence-in-chief in support of the same issue as complainants' evidence-in-chief, already given, and in the same language substantially; and defendants' counsel here also enters his protest against such proceedings as unwarranted either by proper practice or by the order of the court of December 5th, 1887.

Complainants' counsel states that the testimony referred to is proper evidence in his opinion and denies the statements of defendants' counsel.

221 CHRISTOPHER D. BEALE, a witness called on behalf of the complainant-, being duly sworn, deposes and says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?

A. My name, Christopher D. Beale; 53 years old; residence, Evanston, Ill., and my occupation, salesman for Auchincloss Bros.

2 Q. Are you the Christopher D. Beale who testified in this case on July 2d, 1884, on behalf of complainants?

A. I am.

3 Q. I call your attention to questions and answers 12, 13, 14, 15, and 16 of the testimony you then gave for complainants, and also to questions and answers 37, 38, 39, 40, 41 of the testimony of William Wiseman given on behalf of defendants in this case on October 13, 1887. Please read such questions and answers and state

whether the answers "No, sir" to questions 37, 38, 39, 40, and 41 are the truth in relation to the occurrences referred to.

Same objections, suggestions, and consent are here noted as to the two preceding witnesses.

A. No, sir.

4 Q. Can you produce any written record made by you to show where you were on the 2d of February, 1884, the date you have given as that of the occurrence you have testified to in your answer to question 14 of the testimony previously given by you? And please do so, if you can.

A. I can. I produce my reports of that town the day that I was there. The report is in my own handwriting and was written out by me on February 5, 1884, at Keokuk, Iowa, and is as follows (so far as it refers to W. Wiseman)—I read from the entry: "W. Wiseman & Co., R. D. G., job., Coats' W., B.; J. C., Jr., W., B., C., Merrick
222 cab.; no complaint on Merrick; buys with ten, 10, % off." "W. Weisman & Co." is the name of a firm in Keokuk. R. D. G. means retail dry goods. Job means buys those two makes of jobbers—the two makes I refer to. "Coats' W., B." means Coats' white and black. "J. C., Jr., W., B., C." means John Clark, Jr., white, black, and colored. "Merrick cab." means a cabinet containing Merrick's thread. "No complaint on Merrick" means there was no complaint. "Buys with ten, 10, % off" means with a discount of ten per cent. from the trade or regular price—that is, fifty-five cents less six. This is an entry on page 230 of Book No. 2 of Salesman's Reports of Auchincloss Bros., covering States of Michigan, Illinois, Iowa, and Minnesota up to February 11, 1884, and on the same page are the names of ten other firms doing business in Keokuk, Iowa, also in my handwriting and made on the same 2d day of February, 1884; and the whole sheet containing these reports was mailed by me on that day or the next to Auchincloss Bros., in New York city, and there inserted in its regular order in the book where it now is.

5 Q. State whether the inspection of that entry referring to W. Wiseman & Co. enables you to testify positively as to where you were on February 2, 1884.

Further objected to as leading.

A. That, with the other entries, do.

6 Q. Where were you on that day?

A. At Keokuk, Iowa.

7 Q. What does that entry as to W. Wiseman & Co. and the other entries on the same page indicate to you as to whether you visited the store of that firm on that date?

A. It positively indicates that I was there.

8 Q. What does it indicate to you, if anything, as to whether you had any conversation with W. Wiseman & Co. or a member of that firm in regard to Merrick spool cotton on that day?

223 A. It would positively indicate to me that I had a conversation with him and I got the price he purchased it at.

9 Q. Whom do you mean by him in your last answer?

A. Mr. William Wiseman, of Keokuk, Iowa.

10 Q. You have spoken in your answer to question 14, in your testimony given July 2, 1884, of Mr. Wiseman's drawing your attention to the label upon the end of the Merrick spool cotton. Was there anything special about the ends of the Merrick spool or spools which he showed you that attracted your notice at that time?

A. He especially drew my attention to the number knarled on the end of the spool. I mean the stamped or embossed number on the wood, indicating the number of the thread.

11 Q. Have you ever seen a knarled or embossed number on a Merrick spool before you saw it on the spool Mr. Wiseman showed you on this occasion?

A. I had not.

12 Q. Was it a surprise to you to see it on a Merrick spool?

A. Very much so.

13 Q. Why?

A. Because I suppose there was no other make in the market with a number knarled or embossed on it, and that J. & P. Coats had the sole right to that embossed number on the spool.

14 Q. State whether you remember the occurrence testified to by you in your answer to question 14 of testimony of July 2, 1884, in connection with the first time you saw the embossed or knarled numbers on Merrick's spools.

A. I remember the occurrence very distinctly.

15 Q. Do you desire to change in any respect your testimony in your answers to questions 12, 13, and 14, given July 2d, 1884, in view of the testimony of William Wiseman, given in answer to questions 37, 38, 39, 40, and 41 of the testimony for defendants on October 13th, 1887, and in which he denies the truth of your testimony and that of the occurrence set forth in answer to question 14?

A. I do not.

224 16 Q. I call your attention to a letter dated February 10, 1884, and addressed to Auchincloss Bros., and to the following words: "I see Merrick's spool has the numbers the same as Coats'. Have they a right to that spool"? Please state if that letter is in your handwriting and read it in your answer, and state what the sentence I have quoted in regard to the Merrick spool having the numbers the same as Coats' refers to.

A. The letter is in my handwriting; it was sent to Auchincloss Bros. February 10, 1884, the date it bears, and is in the following words:

"ABORN HOUSE, DES MOINES, IOWA, *February 10th*, 1884.

Mess. Auchincloss Brothers.

GENTS: Enclosed find reports of towns visited to date; all look well but Peoria. The snow was entirely gone in the part of Illinois visited, and trade very dull. In this section it is all froze up yet, and snowing to-day. Trade dull here, but every one preparing for a good spring business. Hope they may not be disappointed. The

outlook good for Coats' cotton. Willimantic, Kerr, and Merrick making a strong fight. I see Merrick spool has the numbers the same as Coats'. Have they a right to that spool? Shall reach St. Paul the last of the week.

Yours respectively, C. D. BEALE."

The passage quoted referred to certain conversation I had the last ten days about Merrick's spool cotton with different parties, and asks a question of my principals, Auchincloss Bros.

Adjourned to 11 a. m., December 22, 1877.

225 NEW YORK, *December 23d*, 1887.

Met pursuant to adjournment.

Present: Mr. Betts, for complainant-; Mr. Witter, for defendants.

Mr. Witter states to the examiner that he appears here only for the purpose of serving an order of the court staying further taking of testimony herein until the hearing and decision of a motion made on the part of the defendants herein.

The above order is shown to the examiner.

Complainants' counsel stares that in view of the service of the said order the examination of witnesses herein is adjourned to new notice.

NEW YORK, *January 4th*, 1888—11 a. m.

Met pursuant to notice.

Present: Counsel as before.

Complainants' counsel states that the motion made on the part of the defendants herein referred to in above statement of defendants' counsel, and which was that the deposition- *was* of J. B. Crosby, A. B. Logie, and C. D. Beale be stricken from the record as not testimony in rebuttal, and that complainants be enjoined from taking any such testimony, has been heard by Hon. E. Henry Lacombe, circuit judge, since the last session, and the following order signed and entered thereon upon January 3, 1888:

226 "Ordered that said motion made on the part of the defendants be, and the same hereby is, denied, and the stay of taking of testimony granted on said application hereby dissolved, and the testimony of the above-named witnesses, J. B. Crosby, A. R. Logie, and C. D. Beale, is allowed to stand, together with such other evidence, of a similar character or otherwise, in rebuttal as the complainants may take — the time hereby allotted them.

"It is further ordered that complainants have twenty days from date hereof to take their evidence under this order, said twenty days to expire on Saturday, the 28th day of January, 1881, no testimony to be taken from the 18th to the 22d inst., both inclusive; and it is—

"Further ordered that defendants have twenty days after the termination of complainants' said evidence in which to meet the testimony introduced by the complainants under this order and under the order entered December 5, 1887, defendants' twenty days to begin on the 1st day of February, 1888, and end on the 20th day of February, 1888."

Continuation of the examination of C. D. BEALE by Mr. BETTS:

17 Q. You state in your last answer that the passage quoted in the letter of February 10th, 1884, in regard to Merrick's spool having the same number as Coats', refers to certain conversation you had during the ten days preceding with certain parties about Merrick's spool cotton. Who was the first person you had conversation with of the kind referred to in that passage of your letter?

A. Mr. William Wiseman, of Keokuk.

18 Q. The record shows that you testified herein in New York on July 2, 1884. Can you state whether you called to the at-
227 tention of Auchincloss Bros. the occurrence referred to in your 14th answer of that testimony; and, if so, when and to whom in particular?

Objected to as incompetent and not in rebuttal.

A. I called Mr. Henry B. Auchincloss' attention to it, I think, the last part of June, 1884, on my visit to New York; the same visit at the time I testified and before testifying.

19 Q. Have you had an interview with Mr. William Wiseman in regard to the occurrence testified to in your answer 14 in your testimony of July 2, 1884?

A. I have; November 22d, 1887, at Keokuk.

20 Q. Please give me the substance of what was said at that interview of November 22d in regard to the occurrence testified to by you in answer 14 on July 2, 1884.

A. I undertook to call Mr. Wiseman's attention to that interview of February 2d, 1884, but he failed entirely to have any memory of any such conversation.

21 Q. Can you state anything that he said at this interview of November 22d, 1887?

A. My conversation with him at that time was to draw his attention to my interview with him in 1884. He said he might have substituted Merrick's cotton for Coats', but not with a view of deceiving, as he was then handling Merrick's cotton and it was a matter of business.

22 Q. Did he state anything as to how and why he came to New York to testify for the defendant-; and, if so, what?

A. He said that Merrick's agent had been there and asked him to come to New York to testify in reference to—against some testimony I had given where I had stated that he had deceived customers by substituting Merrick's for Coats' cotton.

23 Q. Did he state why he came and testified?

A. He stated that Merrick's agent had been there and he came down to New York and they paid his expenses.

228 24 Q. Did he make any statement as to why he contradicted your testimony?

A. He only said that he had never deceived any person by selling Merrick's cotton for Coats' when they asked for Coats'.

Complainants' counsel offers in evidence the page of Salesmen's Reports of Auchincloss Bros. of 1879 referred to in the testimony of this witness and containing the entry in regard to William Wiseman & Co. of February 2d, 1884, and the same is marked "Complainants' Exhibit Wiseman's Entry, T. H., sp. ex., January 4th, 1888."

Also the letter of February 10th, 1884, referred to in the testimony of this witness, and the same is marked "Complainants' Exhibit Letter of February 10th, 1884, T. H., sp. ex., January 4th, 1888."

Defendants' counsel consents that the copies of these exhibits be marked and accepted with the same force and effect as the originals.

25 Q. State whether the William Wiseman you saw in Keokuk in November, 1887, was the same William Wiseman in regard to whom you have testified in your 14th answer of your testimony of July 2, 1884.

A. It was.

Cross-examined by Mr. WITTER:

26 X Q. You say in the letter of February 10, 1884: "I see Merrick's spool has the numbers the same as Coats'. Have they a right to that spool?" What numbers did you refer to?

A. The number knarled on the wood on the end of the spool.

27 X Q. Designating what?

A. The number of the spool cotton wound on the spool;

229 also for convenience to consumers for telling the number of spool cotton they were using after the label was destroyed, to my best knowledge.

28 X Q. By number of the thread you mean size of thread wound round on the spool?

A. I do.

29 X Q. That size of thread varies, does it not, from No. 8 to No. 200—I am speaking of the spools of J. & P. Coats?

Objected to as immaterial, as not called — by the direct examination.

A. We have such numbers, from 8 to 200.

30 X Q. Does the size of the thread vary for every one of those numbers—8 to 200?

Same objection.

A. To my best knowledge at present, it does.

31 X Q. Won't you inform yourself accurately on this point, and before your deposition closes answer the question with exactness?

Same objection.

A. I do not think I can.

32 X Q. Are you not, in fact, aware that there are two or more numbers, somewhere between 8 and 200, that are really of the same size, but are numbered with different numbers?

Same objection.

A. I cannot swear to it; I've heard such was the case.

33 X Q. Are you aware that the number of the thread is knarled in more than one place upon the wooden end of the spools of this line of thread by J. & P. Coats?

A. I think it appears in four places.

34 X Q. Does not that make it more convenient for the
230 consumer to know the size of the thread than if it were knarled in only one place?

Same objection.

A. Yes.

35 X Q. And that is true, whether the label be on the spool or not; is not that so?

Same objection.

A. Well, no. In looking at a spool a label appears at the centre, the knarled number at the side. The consumber would have to turn the spool round more to find the number without the label.

36 X Q. So that you think that with the label the consumer can more readily determine the size of the thread, for the reason that the number designating the size appears both upon the label and upon the wooden rim; is that so?

Same objection.

A. With the knarled number only in one spot.

37 X Q. Question re-read. Witness is asked for a clearer answer, if he can give one.

Same objection.

A. It would at the time of purchase.

38 X Q. The knarled number on the Coats' spools, which you have spoken of, appears right side up in one place, whichever way you hold the spool, does it not?

A. It does.

39 X Q. But the number on the label appearing only once is not right up, whichever way you hold it, is it?

Same objection.

A. No.

231 40 X Q. In what part of the label is the number?

Same objection.

A. In the centre, I believe.

41 X Q. You are aware, I suppose, that J. & P. Coats were the owners of letters patent for knarling those numbers on the spool heads?

Same objection and as not called for by direct examination.

A. I am not aware of that fact.

42 X Q. Have you never heard of this before?

Same objection.

A. I do not remember of any conversation about this patent business till June, 1884, but supposed that as J. & P. Coats were using that number knarled on the spool they had some right to it.

43 X Q. But just how they derived that right you were not aware?

Same objection.

A. Not aware.

44 X Q. State whether the labels *as* all the numbers of this J. & P. Coats' 200-yards six-cord thread, from Nos. 8 to 200, are the same, except that they vary in size and in the number- which appear at their centre.

Same objection.

A. The black and gold label is on all numbers from 8 to 200, the same excepting the size of the label and the number of the thread. That refers to the black and gold label only.

45 X Q. I suppose the reason why the knarled number is not put upon the smaller spools is that there is so little room for it outside of the label. Is that so?

Same objection.

232 A. I don't know.

46 X Q. Haven't you ever heard what the reason for this omission is?

Same objection.

A. Never.

47 X Q. The white labels on the reverse end of the spool are also the same on all the numbers, are they not, differring only in size of label and the number indicating the thread size, according to another system of numbering?

Same objection.

A. I think so.

48 X Q. Please look at Complainants' Exhibit "Weisman's Entry," at the language "can make no headway with Kerr," and state whether the thread I now hand you is a sample of the Kerr thread referred to.

Objected to as immaterial and as not called for by direct examination.

A. I cannot state that fact.

49 X Q. Aren't you familiar with the Kerr thread?

Same objections.

A. I have seen it a great many times, but what I have seen lately has been put upon a different-shaped spool, and I cannot now state from memory whether the spool now shown me was the one that I have referred to Feb. 2, 1884.

50 X Q. The spools you refer to as having seen lately are like the spools now handed you, are they not?

Same objections.

A. Some of them are. There is still a great deal of the short spool in the market.

233 The spool first shown the witness is marked "short spool" on the thread, and the one last shown witness is marked "long spool," both being taken from Complainants' Exhibit "Box Comparative Samples."

51 X Q. The spool which you have spoken of as like those which you have seen lately has a black and gold circular label, has it not?

Same objections.

A. It has.

52 X Q. Do you know why some of the Coats' spools having the knarled number that you have referred to have also a star between the knarled number, and others do not? I refer you to the spools in the same box of samples, complainants' exhibit, in which 8, 10, 12, 20, 24, have the star and the other numbers do not.

Same objections.

A. I don't know.

53 X Q. The knarled number appears five times on some of the Coates' spools, does it not?

Same objections.

A. It does in this exhibit, "Complainants' Exhibit Box Comparative Samples."

54 X Q. Have J. & P. Coats, so far as you know, made any change in the reading matter appearing upon the bottom of the boxes containing this 200-yard thread? I refer particularly to the numbers higher than 100.

Same objections.

A. Not to my knowledge.

234 Redirect by Mr. BETTS:

55 Re-D. Q. In answer to X Q. 44 you speak of the labels on J. & P. Coates' spools of 200-yards six-cord thread being the same for

Nos. 8 to 200. State whether or not the wording on the black and gold labels in numbers above 100 is different at all on those spools from the lower numbers. You may examine Complainants' Exhibit "Box Comparative Samples."

A. (Witness examine- J. & P. Coats' spool- in said box:) I notice from 8 to 100 the reading is "J. & P. Coats' best six-cord;" from 110 to 200, "J. & P. Coats' best spool cotton;" on all labels, "200 yards."

Recross-examined by Mr. WITTER:

56 Re-X Q. Do J. & P. Coats make any better spool cotton than their best six-cord?

Objected to as immaterial and not called out by direct.

A. Not to my knowledge.

CHRISTOPHER D. BEALE.

Sworn to before me this 4th day of January, 1888.

THOMAS HUNT,
Special Examiner.

Adjourned to 2.30 p. m.

235 Mrs. SARAH E. HORNBLOWER, a witness called on behalf of complainant-, being duly sworn, deposes and says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?

A. Sarah E. Hornblower; age, fifty-five; I reside at the Aberdeen hotel, corner Broadway and Twenty-first street; I am occupied a few hours a day at the Decorative Art Society, No. 28 East Twenty-first street.

2 Q. State whether you have been in the habit of buying spool cotton for your own use.

A. Yes.

3 Q. State whether you have lately visited any stores in the city of New York for the purpose of purchasing spool cotton; and, if so, at whose request.

A. I have; at the request of Mr. Edgar S. Auchincloss, of the firm of Auchincloss Bros.

4 Q. State what spool cotton you asked for on the occasion I have referred to.

A. Coats' cotton.

5 Q. State whether, having asked for Coats' cotton, you received any other make of cotton; and, if so, when and where.

A. I did on one occasion, at 182 Third avenue—the name was L. Abrams—between Sixteenth and Seventeenth streets.

6 Q. On what date was that?

A. On Tuesday, December the 6th.

7 Q. State what you asked for, describe the person who served you, and the manner in which the purchase was made of the spool cotton you refer to.

A. I asked for Coats' cotton. I was served by a boy of about eighteen. He picked me out the numbers I asked for—60, 80, and 40; he wrapped them in paper and gave them to me. I put them in my ulster pocket and opened the parcel after I reached home.

8 Q. Did you see whose make of spool cotton the spools
236 you bought on this occasion at 182 Third avenue were before they were wrapped up or examine them at that time?

A. No.

9 Q. Did you know whose manufacture they were until you unwrapped the parcel at home?

A. No.

10 Q. Will you produce the spools you bought on that occasion?

A. I do so. They are three spools: No. 40 of the Merrick Thread Co.; No. 60 and 80 of J. & P. Coats.

11 Q. State whether these spools have been in your possession since purchasing them on December 6th, and whether they are the same three spools that were wrapped up and that you bought at 182 Third avenue on that day.

A. They have been in my possession ever since and they are the same spools that I bought at that place.

12 Q. How did you pay for them?

A. Three five-cent pieces to the boy who wrapped them up.

The three spools produced by the witness are offered in evidence by the complainants' counsel and marked Complainants' Exhibit "Hornblower's Spools 1, 2, 3," T. H., sp. ex'r, Jan'y 4th, 1888.

13 Q. At whose request have you come here to testify?

A. Mr. Edgar S. Auchincloss.

The testimony of this witness is here seasonably objected to as not in rebuttal, and it is further objected to as making a new *prima facie* case and as incompetent.

Complainants' counsel refers defendants' counsel to the orders of court under which this testimony is being taken and the decision of Hon. E. Henry Lacombe, circuit judge, in regard to the character of testimony which might be taken.

237 Cross-examined by Mr. WITTER:

14 X Q. You say you made this purchase on December 6th. When was it, if you remember, that Mr. Auchincloss requested you to make the purchase?

A. About the first of December or the last of November.

15 X Q. What did he ask you to do?

A. To visit some retail stores in various parts of the city and ask for and purchase Coats' cotton.

16 X Q. And then were you to let him know what you received in each case?

A. I had no such instructions.

17 X Q. What did you understand to be the object of the request and of the purchases?

Objected to as immaterial.

A. The instructions came to me through my son only to buy Coats' cotton. That word only does not *not* belong there; the instructions only were to buy Coats' cotton.

18 X Q. How did Mr. Auchincloss happen to give the instructions to your son?

A. To reach me, I suppose.

19 X Q. Does Mr. Auchincloss know your son? Is he in the employ of Mr. Auchincloss' firm?

A. Yes; he is.

20 X Q. How many places did you visit on this errand?

A. About twenty; perhaps a few more.

21 X Q. Did you keep a memorandum of the transactions at each of them?

A. No.

22 X Q. Not any of them, except the one you have testified about?

A. I kept no memorandums.

23 X Q. How did you recollect that you made this particular purchase on the 6th of December?

A. Because that was the day I was in Third avenue.

238 24 X Q. Was the thread in each instance wrapped up without your seeing what you had purchased?

A. It was put in with the other articles I purchased in the same parcel.

25 X Q. You speak of some twenty purchases. I intended to inquire whether in the case of any purchases you looked to see what you had received before you left the store—that is, at the time of the purchase?

A. I took a general look to see that the articles I asked for were there.

26 X Q. You say the case of the purchase of the three spools—1, 2, and 3—that you did not know whose make they were until you unwrapped the parcel at home. Whose make did you then discover them to be?

A. One of No. 40 Merrick's; the other two Coats'.

27 X Q. How did you recognize one of them as Merrick's?

A. By finding the name on the label.

28 X Q. How did you recognize the other two as Coats'?

A. In the same way.

29 X Q. Have you ever used Willimantic thread?

A. I have never bought it. I don't remember having used it.

30 X Q. But you have seen it, I suppose?

Objected to as immaterial.

A. I don't think I ever have.

31 X Q. What thread do you habitually use?

A. Coats'.

32 X Q. How many spools did you buy at each of your twenty visits?

A. At some, none; at some, two; at some, three.

33 X Q. Can you tell what you received at each of the other three places at which you bought two—three spools?

A. Coats' cotton.

34 X Q. And no other?

A. None.

239 35 X Q. You say that when you unwrapped the parcel at home you recognized that one of the spools was of Merrick's thread by finding the word Merrick on the label. Could you have recognized it in the same way if you had opened the parcel and looked at the spool at the store?

A. Yes.

36 X Q. Why didn't you look at them at the store?

A. It is not my habit.

37 X Q. Do you mean that you trust the seller?

A. Yes; to put up spools of cotton.

38 X Q. Both as to number and as to make?

A. Yes.

39 X Q. Won't you mention what other places you called at the request of Mr. Auchincloss?

A. Various little retail stores on Third avenue and Sixth avenue and Eighth avenue; also First avenue, in one store only.

40 X Q. I mean can you give the names of the dealers?

A. No.

41 X Q. Of no others except Mr. Abrams?

A. Not the name.

42 X Q. What particular kind of work do you do at the decorative art?

A. Answer letters, keep accounts.

43 X Q. You do no embroidery or sewing, if I understand you, there?

A. No.

44 X Q. When you have made a purchase of cotton how do you tell whether you have the right number or not?

A. By looking at the numbers.

45 X Q. By looking at the numbers where?

A. Anywhere on the spool.

46 X Q. And how do you tell whether you've got the make you want?

A. By looking at the spool.

240 47 X Q. Do you mean by looking at the name, as you said was the case when you bought Coats' and Merrick's thread?

A. Yes.

48 X Q. What numbers of thread do you use chiefly?

A. 30, 40, 60, and 80.

49 X Q. If you had asked for No. 40 Coats' thread and were given some other number and were particular about having No. 40, what would you do?

A. I don't understand that question.

50 X Q. I mean if you had asked for No. 40 Coats' thread and you found on going home that the salesman had put up No. 80 instead of No. 40 and you really wanted No. 40 and not No. 80, what would you do?

A. Go out and buy a spool of No. 40.

51 Q. Or exchange the 80 for 40, I suppose, at the place where they gave you the wrong number?

A. No.

52 X Q. Why wouldn't you do that?

A. I would keep the 80 for use for another time and buy a 40.

53 X Q. But suppose that you never had occasion to use thread finer than No. 40?

Complainants' counsel objects to this line of examination as immaterial and not called out by any direct.

A. Can't suppose it.

54 X Q. How fine do you use?

A. As high sometimes as 125.

55 X Q. Always Coats'.

A. I have some fine French thread.

56 X Q. How high numbers of Coats' thread have you used?

A. I can't remember.

57 X Q. Have you ever observed any difference in the labels or the design on the wooden spool of such Coats thread as you bought at these recent purchases or in such Coats thread as you have used, except that the number varies with the size of the thread,
241 and that the labels vary in size with the size of the thread or spool?

Objected to as immaterial and as not called for by the direct.

A. I don't understand the question; it is all mixed up.

58 X Q. The Coats' thread bears a label in black and gold with their name on it, does it not?

Same objection.

A. I believe so.

59 X Q. And this label varies in size with the size of the spool—that is, a little spool has a smaller label than the big spool; is not that so?

A. Yes.

Same objection.

60 X Q. And the Coats' spool has the number stamped in the wood outside the label, has it not?

Same objection.

A. It has.

61 X Q. And the number both on the wood and on the label varies with and indicates the size of the thread, does it not?

A. Yes.

Same objections.

62 X Q. Can you mention any other particular in which the label or the stamping outside of the label varies?

Same objections.

A. No.

242 63 X Q. You never noticed any other variation, have you?

Same objections.

A. No.

64 X Q. Do you remember where Mr. Abrams kept his spool thread, whether in a drawer or in a cabinet, or didn't you notice?

A. No; I don't remember.

65 X Q. Did you see where he took the three spools or either of them from, or did he just hand them to you done up in a paper?

A. He handed them to me in a paper.

66 X Q. Did you buy anything else on this occasion with the thread?

67 X Q. What did you do with the other thread which you purchased and which you have not brought here to-day?

A. Put them with the rest of my work materials.

68 X Q. Why did you bring these three spools here to-day and not the others? State as fully as you can.

A. I didn't think they would be wanted.

69 X Q. What was your reason for thinking the others would not be wanted?

A. I had no reason for thinking either way.

70 X Q. It was merely accidental, then, that you brought these three and left the other three?

A. No.

71 X Q. In what respect not accidental?

A. One of these was Merrick's and the other two Coats'.

72 X Q. Then the reason you brought the three spools here to-day was because there was a Merrick spool found in the purchase; is that so?

A. Yes.

73 X Q. Now, what made you think it was desirable to have a purchase with a Merrick spool found in it, or what made you bring the purchase that contained the Merrick spool?

A. I understand it was wanted.

243 74 X Q. From whom did you understand it?

A. From my son.

75 X Q. For whom did you understand it was wanted?

A. From Mr. Auchincloss' lawyer.

76 X Q. During what days were you engaged in making these purchases?

A. Through the first fifteen or sixteen days of December, as near as I remember; it may have been longer.

77 X Q. Did your son help you at all?
A. No.

Redirect waived.

SARAH E. HORNBLOWER.

Sworn to before me this 4th day of January, 1888.
THOMAS HUNT, *Sp. Ex.*

Adjourned to January 5, 1888, at 2 p. m.

244 NEW YORK, *January 5th*, 1888—2 p. m.

Met pursuant to notice.
Present: Counsel as before.

GEORGE E. BRIGHTSON, a witness called on behalf of the complainants, after being duly sworn, deposes and says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?
A. My name is George E. Brightson; I am 40 years old; my residence is in Brooklyn, N. Y., and I am one of the managers of the house of H. B. Claflin & Co.
2 Q. How long have you been with H. B. Claflin & Co., and of what department there are you the manager?
A. About two years and six months; of the notion department—that is, the department spool cotton is bought and sold in.
3 Q. State how far back your experience in buying and selling spool cotton dates, and with what firms and with business connection.
A. I think I began in 1866 as a boy in the notion department of C. H. Bowman & Co., of New York, and after being with them a few years—two or three—I was employed by Tefft, Griswold & Kellogg, in the notion department, selling spool cotton among other things; that was one of our large items of business. After being with that house about two years, I then became manager of a new house, formed at that time, called Francis M. Bacon & Co.; that house at the expiration of one year retired from business. A new house was formed called J. M. Wentz & Co. I remained with them as manager for about six years. After that I managed the same line of business for the house of Van Valkenberg, Beach & Co. for one year. I then became partner of Sweetser, Pembroke & Co., and managed
245 the same line of business there. I introduced the department in that house. It was a new line with them. Four years I was partner there. Following that there was two and a half years I was in business under my own name, but did not handle spool cotton. Following that I became the manager and am such still of the fancy-goods department of H. B. Claflin & Co.; that includes the notion department, and such goods are sold there, including spool cotton.

4 Q. What brands of spool cotton have you bought or sold during the period covered by the last answer?

A. Coats', Orr & McNaught's, George A. Clark, called O. N. T.; John Clark, Willimantic, and Merrick. Those are the leading brands. I might include Brooks' and Kerr's.

5 Q. Is the business of H. B. Claflin & Co. an extensive one in spool cotton?

A. Yes, sir.

6 Q. Are your sales of Coats' cotton large or small in a year?

A. I think it's the largest of any spool cotton we handle. It is a large quantity.

7 Q. In what numbers is J. & P. Coats' cotton sold by H. B. Claflin & Co.?

A. In all the numbers they make.

8 Q. State what has been your understanding since you have been in business relating to spool cotton of the number of cords in the higher numbers of Coats' 200-yard cotton. I refer to the numbers above 100.

A. Always supposed them to be three-cord, from a general understanding of the business.

9 Q. State whether that is a general understanding in the trade, so far as your knowledge and experience goes in regard to Coats' 200-yard spools, numbers above 100.

A. I never knew anything to the contrary.

10 Q. What is your understanding in regard to Coats' spools in numbers up to and including 100 of 200-yard cotton and the understanding of the trade in regard to those numbers—as to number of cords of the thread?

246 A. It is rather difficult for me to speak for other people. As far as my observation and experience goes, I always understood all coarse, medium, and medium fine to be six-cord.

11 Q. What proportion of the sales of H. B. Claflin & Co., about, is of numbers above 100 in 200-yard spool cotton?

A. In proportion to the other numbers, I would say it was so small that it would be difficult for me to estimate without having my books to refer —. Very small, indeed.

12 Q. Less than one per cent.?

A. Yes; considerably less, I would say.

13 Q. Is this also true of the other firms you have mentioned you were connected with prior to being with H. B. Claflin & Co.?

A. Yes, sir.

14 Q. Is it also true of Coats' thread in particular?

A. I would include all first-class so-called six-cord spool cotton.

15 Q. What brand of spool cotton, in your opinion, bears the closest resemblance to Coats' cotton in the appearance of its spools and labels?

A. As I see them before me, I should say Merrick's.

(Witness points to Complainants' Exhibit "Box of Comparative Samples.")

16 Q. Which is the better spool cotton, in your judgment, Coats' or Merrick's?

A. Being guided by the demands of the people, I'd say Coats'.

17 Q. Which has had the largest sale, in your experience?

A. Coats'.

18 Q. State whether H. B. Claflin & Co. and other firms with which you have been connected have bought and buy Merrick's cotton at a lower price than Coats'.

A. I think they all have done so. You have said all the firms. I am not sure about the one I began with. I am not sure whether Merrick was sold at that time or not.

247 19 Q. State whether H. B. Claflin & Co. and the other firms sell and have sold Merrick's thread while you were with them at a less price than Coats'.

A. Yes, sir; under the name of Merrick, there have been two grades sold—one of three-cord and one of six.

20 Q. I refer to 200-yard so-called six-cord.

A I would say yes. I have bought and sold them for less; don't think I ever sold Merrick's as high as Coats'.

21 Q. State whether, in your opinion, the resemblance which you have stated exists between the appearance of the spools and labels of Coats' and Merrick's thread is so close that it is calculated to deceive and render the different brands liable to be mistaken for each other.

Objected to as leading.

A. I would say to the wholesale trade not, for the reason that they are bought and sold by the names—the brands; in the retail trade it is possible to create such confusion as you ask, I would think.

22 Q. In regard to Willimantic, to John Clark Jr.'s "Mile-end," George A. Clark's "O. N. T." spool cotton, what has been your understanding of the number of cords in what you have called the finer numbers of 200-yard so-called six-cord spool cotton?

A. I never understood any of them to be more than three-cord.

23 Q. State whether Coats' spool cotton, in the finer numbers above 100, as far as your experience goes, has given satisfaction to customers.

A. I never heard a complaint.

24 Q. In what shape is spool cotton bought and sold by such firms as H. B. Claflin & Co.—I mean as to packages and boxes?

A. About 100 dozen to a case. I think the outside cases 248 are wooden boxes. I think then they are subdivided into ten dozen packages; each of the dozens is in pasteboard boxes, ten of them in a package.

The testimony of this witness is here seasonably objected to as not in rebuttal, and it is further objected to as making a new *prima facie* case and as incompetent.

Complainants' counsel refers defendants' counsel to the orders of

court under which the testimony is being taken and the decision of Hon. E. Henry Lacombe, circuit judge, in regard to the character of testimony which might be taken.

Cross-examined by Mr. WITTER:

25 X Q. In the 100-dozen boxes contained in a single case, and which are known as assorted dozens of Coats' thread from 8 to 150, or 8 to 200, how many dozens, if you remember, are of numbers higher than 100? Is it not ten?

A. I would think it was.

26 X Q. Do you remember how the ten-dozen packages are marked upon the outside of the package?

A. I cannot recall it. I think I could identify them if I could see them.

27 X Q. Can you remember that the name of Coats is upon them?

A. I cannot.

28 X Q. What proportion of your sales of Coats' thread is of the unbroken original 100-dozen cases?

A. To guess at it, I would think about twenty per cent.; it might be fifty.

29 X Q. And in other instances you make up such an assortment as is ordered by the dealer who buys of you; is that so?

A. We give our people what they want. If you mean by that question the sale always to be a 100 dozen in each case, it is not so.

30 X Q. No; I didn't mean that. I meant to imply that
249 the quantity as well as the numbers wanted might vary indefinitely. With that understanding, can you answer question 29 in the affirmative?

A. We sell them the quantity they want of each number.

31 X Q. Do you personally select the dozens for the customers of your house?

A. Not at present, but I have done so for years.

32 X Q. What name do you give as describing the various houses you have named in your direct examination as houses with which you have been connected?

A. Wholesale dealers, often called jobbers.

33 X Q. And the people you sell to buy to sell again; is that so?

A. Yes, sir. For the purpose of making a profit, oftentimes we do sell to manufacturers.

33½ X Q. Still at wholesale?

A. Yes, sir; and not to retailers. We do no retail business. We do sell to retailers, but no sales at retail; always in quantities.

34 X Q. As I understand it, you don't break the one-dozen boxes or sell thread by the spool?

A. We do not.

35 X Q. And with the other concerns your practice has been the same as you have now described it?

A. About the same.

36 X Q. What do you mean by about the same?

A. In former years my business was smaller.

37 X Q. What was your occupation before you went with the first concern you have mentioned, namely, Bowman?

A. School. I had been in no business previous to that time.

38 X Q. How long has it been the practice of the thread companies you have mentioned to put their 200-yard six-cord thread in one-dozen pasteboard boxes?

A. I think they would all differ; I don't think any of them began at the same time.

39 X Q. That has been the practice for a good many years of all of them, has it not?

A. Well, I'll say of most of them.

250 40 X Q. What exception do you think of?

A. I can't recall.

41 X Q. Have you bought and sold thread known as three-cord thread?

A. Yes, sir.

42 X Q. What price do you pay for a three-cord thread as compared with the price you pay for a six-cord thread or, as you term it, a so-called six-cord thread? Is it more or less?

A. Less.

43 X Q. The price of three-cord thread is about half the price of six-cord thread, is it not?

A. It's not more than that. Brands vary.

44 X Q. But, notwithstanding the variation you speak of, the price of three-cord thread is not very far from half the price of six-cord thread; isn't that so?

A. That is right.

45 X Q. Do you pay a six-cord price or a three-cord price for the so-called six-cord 200-yard thread of J. & P. Coats, but which is in fact three-cord in numbers above 100?

A. We buy it and sell it on its brand, and the term of six-cord is seldom used in handling it; it is called Coats' cotton.

46 X Q. You have not answered my question, I think. Please hear it read and try again.

A. Yes, sir; we pay their price, established by them.

47 X Q. As I understand it, they have two established prices—one an established price for six-cord 200-yard—that is, their best—spool cotton and another established price for the thread known as three-cord thread, and which, as you say, is about half the former or six-cord price. Which of these two prices do you pay for the 200-yard so-called six-cord thread of J. & P. Coats of numbers finer than 100?

A. I purchase from them but one brand; was not aware that they sold any thread under the name of what might be termed three-cord, but always knew or supposed extreme fine numbers of the same brand to be three-cord.

251 48 X Q. I remember you said that on the direct examination. Do you pay the same price for what you call the extreme fine numbers of the so-called six-cord 200-yard J. & P. Coats thread as you do for the coarser members?

A. I pay one price for all the thread I buy of them under that brand known as Coats' cotton.

49 X Q. What do you pay per dozen?

A. Their trade price, fifty-five cents, with the discount usually given to the trade.

50 X Q. And you pay the same for No. 200 as for No. 8, do you not?

A. That's right.

51 X Q. And this is true, notwithstanding the fact that they are six-cord up to and including 100 and three-cord from 110 to 200, inclusive, is it not?

A. Yes, sir; it made no difference to the trade that came under my observation.

52 X Q. And H. B. Claflin & Co. sell all these numbers of this thread from 8 to 200 at a uniform price per dozen, do they not?

A. Yes, sir; the same as all dealers.

53 X Q. And that price is about twice as great as the price of the same length of thread in what is known and marked as three-cord, is that not true?

A. If you have reference to cheaper material I should say yes. There are different qualities of three-cord; I shouldn't classify them all alike.

54 X Q. Do you know of any three-cord thread of J. & P. Coats' make which is marked three cord that brings in the market more than about half the price which you pay for the 200 yards so-called six-cord thread, numbers 8 to 200?

A. I have only handled the one brand of Coats' cotton; that's the one before mentioned.

55 X Q. But you know of the three-cord thread of J. & P. Coats which is put up in longer lengths than 200 yards, do you not?

A. Not to my own observation. I would believe that property would be more for manufacturers and not for jobbers whom I represent.

252 56 X Q. Will you swear that H. B. Claflin & Co. do not sell it?

A. No, sir; but I will swear that I never personally sold it. I think it has been sold under my management while with them. I would like to add a clause to make that appear just right, to say that I have a submanager under me who cares for all special orders applicable to spool cotton, and it is my belief that in that way this cotton has been sold.

57 X Q. And this is the three-cord cotton which you have heretofore in your deposition spoken of as bringing in the market about half the price of the so-called six-cord?

A. No, sir; it is not.

58 X Q. Well, it does bring about half that price, and no more, does it not?

A. I am not sure. In my former answers it did not occur to me that J. & P. Coats had or sold a thread known as three-cord. In my mind I referred to cheaper grade cottons. I will classify them if you wish.

59 X Q. Will you ascertain and tell us at the next session at what price H. B. Claflin & Co. buy and sell that thread of J. & P. Coats' make which is marked and known as three-cord and which is put up in lengths longer than 200 yards?

A. Haven't the slightest objection.

Adjourned to January 6th, 2 p. m.

NEW YORK, *January 6th*, 1888—2 p. m.

Met pursuant to adjournment.

Present: Counsel as before.

Cross-examination of Mr. BRIGHTSON continued:

60 X Q. An answer is now requested to X Q. 59.

A. We have had but one transaction in that article. A
253 single dozen was bought at $3.80 a dozen, less 6 per cent. cash, 30 days, on December 21st, 1885, twenty-four hundred yards spools, one dozen of No. 90, white.

61 X Q. When the Willimantic 200 yards six-cord thread was a comparatively new thread upon market it was bought and sold at a lower price than the Coats' 200-yard six-cord thread was it not?

Objected to as immaterial and not called out by the direct.

A. Right; it was.

62 X Q. Will you state about how much less as nearly as you can recall it?

Same objection.

A. I should not care to answer that question without looking at my books.

63 X Q. Was it somewhere about ten per cent.?

Same objection.

A. I would think so.

64 X Q. Up to about what time approximately was the Willimantic thead sold at a lower price than Coats'?

Same objections.

A. I don't remember the exact time. As near as I can say there were inducements offered on the Willimantic above that of Coats' to about 1880. In that statement I may be one or two years out of date.

65 X Q. And about the time when the prices became the same for the two threads was about the time when the present combination of Coats, Willimantic and the two Clarks was formed to keep up the price and to keep the same price. Is that as you understand it, substantially?

Same objections.

A. Personally I don't know that there is such a combina-
254 tion. I do know, however, that the trade prices of the concerns mentioned are about the same.

66 X Q. There is a general understanding in the trade that there is such a combination, is there not?

Same objections.

A. I believe so.

67 X Q. The Wilimantic 200-yard six-cord thread in white color is wound upon black-colored spools and in black and other colors is wound upon white-colored spools. Is not that so?

Same objections.

A. I don't think that I can answer that question properly of my own knowledge. It is many years since I opened an inside package of that cotton.

68 X Q. The same is true of John Clark, Jr.'s, white, black, and other colored cottons, is it not?

Same objections.

A. In former years I would say that I knew that John Clark, Jr.'s, white cotton was on black spools; further than that my answer would be the same as to the former question.

69 X Q. Is it true that about as much black 200-yard six-cord thread as white is bought and sold by your concern?

Same objections.

A. I would think not. I would think there would be more white sold. I am answering that without having made any calculations.

70 X Q. Taking the black and other colors together, would you not feel safe in saying there was as much of them sold as of the white?

Same objections.

A. That would depend some on the season.

255 71 X Q. Take the year through and speaking roughly, it wouldn't be far out of the way to say that as much black and other colors taken together are sold as of white, would it?

Same objections.

A. I would think far out of the way, if you include all the makes I have mentioned.

72 X Q. In answer to question 10 you say, referring to the 200-yard so-called six-cord cotton of J. P. Coats: "As far as my observation and experience goes, I always understood all coarse, medium, and medium fine to be six-cord."

What numbers of this thread do you include in the description, "coarse, medium and medium fine"?

A. I would include all numbers between 8 and 80 or 90, inclusive.

73 X Q. How about 100? What have you always understood as to that?

A. In answering these questions I'm using my early education in the notion business. I was never quite sure where "three-cord" began in the line.

74 X Q. Is there anything upon or about this 200-yard so-called Coats cotton in the finest numbers that in itself would lead you to think it was three-cord thread? Please answer this question first from your recollection of the appearance of the boxes and of the spools and without looking at either; and, if you think there is any such thing, state what it is.

A. I don't recollect of having seen anything of the kind in regard to the three-cord asked about or having had it brought to my notice from the fact that it was bought and sold by the houses I have represented as the brand of Coats' cotton alone.

75 X Q. Will you now look at the spools of Coats' thread appearing in Complainant's Exhibit "Box Comparative Samples," and especially at the finest numbers; also the box of Coats' thread marked "Coats' Three-Cord Samples No. 16," and state whether you
256 find anything upon them or either of them which would lead you to think that the thread was three-cord as distinguished from being six-cord?

Objected to as misleading and not distinguishing between the numbers.

A. I see nothing.

76 X Q. Now, do you find anything upon or about the said spools above No. 100 or box that indicates that the thread is not six-cord?

A. That 110 I can't take out. There is nothing. I see nothing on the others.

77 X Q. Now, look at the label on the inside of the box shown you and see if you do not find there the words "best six-cord spool cotton, white and black, 8 to 200."

A. It is so marked.

78 X Q. And also on the bottom of the box you find "best six-cord," do you not?

A. It is not marked, but it does not include the numbers like the labels on the inside of the box.

79 X Q. You also find on the said label the words "best six-cord" in connection with a device called "trade-mark for the United States"?

A. Yes, sir.

80 X Q. Has your attention been called to these particulars before to-day; and, if so, when?

A. They have not. To-day is the first my attention has been directly called to them.

81 X Q. Now, if it were not for the understanding which you say you have acquired that the thread in that box is in fact three-cord, would you not infer from the language which appears upon the box and which in like manner appears upon the boxes containing spools of thread—that is, six-cord—that the thread in box in No. 16 was also six-cord?

Objected to as incompetent.

A. Yes, sir; it reads so.

257 82 X Q. Do you know of any change that has been made in the marking of the boxes or flaps of boxes or the labels of Coats' cotton in numbers above 100 or numbers below 100 within the last, say, five years?

A. No, sir. The only change I ever remember of noticing of putting up their cotton is the change from papers to boxes and from zinc to wooden cases.

83 X Q. So far as you know, is there any difference between Coats' "best six-cord" and Coats' "best spool cotton;" are not these terms, so far as you know, equivalent terms for the same thing?

A. In my trading experience I never noted a difference. With us the cotton has always been sold by the brand, Coats' cotton, irrespective of cords.

84 X Q. And is that true throughout the business of buying and selling this cotton, so far as you know?

A. That is my opinion.

85 X Q. Does your concern buy and sell brand of spool cotton known as "Merrick's" now, or has it ever done so? I refer to the 200-yard six-cord, of course.

A. I will answer that question in a general way by saying it has bought and does buy about every brand of spool cotton made for which there is any demand.

86 X Q. Are you now selling the Merrick's cotton, such as appears in Complainants' Exhibit Box Comparative Samples?

A. I can't answer without looking at the stock.

87 X Q. Look at the spools of Merrick's thread now shown you and contained in the box marked "Defendants' Exhibit No. 21, Box Containing Six-Cord 200-Yard Thread, 110 to 140," and state whether you do not find on the black and gold label of those spools the words "best six-cord" and the same language on the top of the box cover.

A. It is so marked. The box submitted is so marked; also the spool marked with a label containing that description.

88 X Q. And you also find six-cord on the label at the reverse end of the spool; did you look at that?

A. That is right. It is marked six-cord.

258 89 X Q. Is it not fair to assume that the thread upon those Merrick spools is six-cord, in view of these statements upon the goods?

A. I would not think so; some people might. My idea would be an attempt on the part of the manufacturer to economize, so few of those finer numbers being used in proportion to the coarser numbers, rendering it unnecessary for the manufacturer to change his die for his label, and the old custom of leading manufacturers selling the fine numbers in the six-cord line.

90 X Q. Please satisfy yourself whether the Merrick thread referred to, being No. 40, is or is not six-cord.

A. It appears like six-cord, with the light I have before me and the advantages I have for inspection.

91 X Q. About how many dozens of the Coats 200-yard six-cord thread do H. B. Claflin & Co. sell per month?

A. I should have to refer to my books. It is no particular secret, but I should prefer not to state. An opposition company might think I was favoring one line. I want to say that the sales are nearly equal in two of the larger manufactures.

92 X Q. Do you sell as many as ten thousand dozen a month of the said Coats thread?

A. I think not.

93 X Q. As many as five thousand per month?

A. I don't care to answer that question without referring to my books. I would prefer if, in answering, to make it nearer being accurate than I can from memory.

94 X Q. Do the Coats people, so far as you know, make any better spool cotton than that described by them as best six-cord?

A. I don't know.

Redirect examination by Mr. BETTS:

95 Re-D. Q. When you speak of those cord thread whose price is about half the price of six-cord thread, what do you mean by that three-cord?

A. Cheap spool cotton.

259 96 Re-D. Q. Does that run into finer numbers above 100?

A. No, sir. I mean cheap spool cotton in which commoner material is used in the manufacture and which could not be worked successfully in finer numbers.

97 Re-D. Q. Is this cheap three-cord thread a different quality and grade of thread from the higher numbers of what is known under the brand of six-cord thread?

Question objected — for the reason — is not shown to be competent as to the grades and qualities of material and as to the processes of manufacture of spool cotton, but no objection will be made to this question provided the competency of the witness as a manufacturer or as intimately acquainted with the manufacture of threads, including that of qualities of material is shown; and this objection is also seasonably made to question and answer 96.

A. That has always been my supposition from knowledge obtained by conversation with the manufacturers.

Further objected to as hearsay.

98 Re-D. Q. Is that your understanding in the trade, so far as your observation goes?

A. That's my belief.

99 Re-D. Q. What do you understand by the words "six-cord thread" in the trade?

A. Do you mean me to name the kinds?

100 Re-D. Q. You may do so, but I mean especially what kind or grade or quality of spool cotton they would indicate to you when used in the trade.

A. The best grades; generally soft finish.

101 Re-D. Q. Independent of the actual number of cords, referring especially to the higher numbers?

A. It has been my understanding that all the better—the
260 so-called six-cord—thread was made of the best material and cotton and was only six-cord up to the fine numbers, and above that were three-cord, made from more carefully selected cotton, if possible, than the coarser numbers.

102 Re-D. Q. Please look at the spools of Coats' thread appearing in Complainants' Exhibit "Box of Comparative Samples," at the numbers above 100, and state whether you find anything upon them which states that the thread is six-cord.

A. The numbers before me here have not a mark of six-cord cotton on them.

103 Re-D. Q. Please look at the spools on the box marked "Coats' three-cord sample No. 16" and state whether you find anything upon those spools which states that the thread is six-cord.

A. Nothing.

104 Re-D. Q. What do the words "best six-cord spool cotton" on the label in inside of box marked "Coats' three-cord samples No. 16" indicate to you in the trade?

A. Coats' best cotton.

105 Re-D. Q. And the same is true of the same words on the bottom of the box, is it?

A. Yes, sir; that is the brand complete.

106 Re-D. Q. Coats' and Merrick's cotton are billed to you at different and distinct prices, are they not?

A. Yes, sir; I would think so. I don't recall any bill of Merrick's six-cord.

107 Re-D. Q. State at about what time and under what light you made your examination with reference to Merrick's thread No. 140 being six-cord.

A. About 4.30 p. m.

Recross-examined by Mr. WITTER:

108 Re-*D.* Q. Do you mean to be understood that you have any personal knowledge of the grades and qualities of material or of the processes of manufacture of spool cotton other than as you may have heard about it in casual conversation?

261 A. I would say yes to that. I have had more experience and obtained more knowledge than could be obtained from casual conversation. The knowledge obtained has been from others, but in this way: the subject of qualities used by the various manufacturers has been repeatedly mentioned in my dealings with them.

109 Re-X Q. But you have never been a manufacturer or had personal knowledge of the material and processes of manufacture of spool cotton, have you?

A. I have no practical experience.

110 Re-X Q. Don't you know that "six-cord" as applied to thread means thread made of six strands, and that "three-cord" as applied to thread means thread made of three strands, as stated by the complainants, the Coats people, at folios 9, 10, and 11, page 3, of the bill of complaint in this case as follows:

"All the thread manufactured and sold by the plaintiffs which is wound on spools of 200-yard lengths has been and still is composed of six separate strands carefully twisted together, thereby giving to said thread extra strength and durability, and is known as "six-cord" thread, and was by them first designated and has always since been designated by the plaintiffs upon their labels and wrappers and in their advertisement as "best six-cord." Some thread composed of a less number of strands than six and known as "three-cord" thread is also made and sold by the plaintiffs, but to distinguish it from the plaintiff's principal and generally and best known manufacture it is and has been always wound in longer lengths than 200 yards and is wound on larger-sized spools, with labels varying in character from the six-cord thread, as hereinafter more particularly set forth."

A. In answer to that I would say practically six-cord thread would be made from six strands and three-cord from three.

111 Re-X Q. Do you know the names of the various grades of raw cotton that are used by the Coats people in making their three-cord thread and their six-cord thread? If you do, will you name them?

262 A. I do not from personal knowledge.

112 Re-X Q. Do you know which costs the most to make, six-cord or three-cord, when made from the same material?

A. I do not. I would think that to answer that question properly it would be necessary to state that my opinion would be cost would be somewhat by the size of the thread to be manufactured.

113 Re-X Q. But of the same size and the same material, which would cost the most?

A. That I can't answer, because I don't know.

GEO. E. BRIGHTSON.

Sworn to before me this 6th day of January, 1888.

THOMAS HUNT,
Special Examiner.

Adjourned to 10.30, January 7, 1888.

263 NEW YORK, *Jan.* 7, 1888—10.30 a. m.

Met pursuant to notice.

Present: Counsel as before.

JOSEPH E. DALLON, a witness called on behalf of the complainants, being duly sworn, deposes and says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?

A. My name is Joseph E. Dallon; about 53 years of age; my residence is 224 Rivington street, Brooklyn; my occupation is that of a salesman for the Steele and Johnstone Manufacturing Company of Waterbury, Connecticut; their office in New York is at 35 Howard street.

2 Q. State what experience you have had in dealing in spool cotton, when it began, how long it continued, and with what firms.

A. In 1852 was my first introduction to spool cotton, with the firm of Hawes & Hinsdale, of New York; next, in 1856, I think it was. I went then with the house of Hurlburt, Van Valkenburgh & Co. There I took charge of their notion department and bought all the goods of the department. Next, I think, was in 1859, with the firm of Stone, Star & Co., and continued with them until 1864, I think it was, still in charge of the notions department. Then, in January, 1865, I went with the house of E. S. Jaffray & Co. I was along with that firm, buying spool cotton and everything else, until 1869. In 1869 I went with the house of Paton & Co., still in charge of the notion stock, buying and selling spool cotton, until 1871. Since that time I have not been a buyer or seller of spool cotton, but selling goods to the notion department and houses up to the present time.

3 Q. In 1852, the time of your first introduction to spool cotton, what was the leading spool cotton in the market?

264 A. J. & P. Coats.

Defendants' counsel requests the examiner to note the fact that after complainants' counsel had put question 3, and before the examiner had read it over to the witness, the witness answered the question by using the words "Coats' spool cotton."

Complainants' counsel requests the examiner to note just what occurred.

The examiner states he does not know what the witness said before the question was read to him by the examiner, and that the answer *is* written down to question 3, namely, "J. & P. Coats," was the answer of the witness to the said question 3, given when the said question was read to him by the examiner.

4 & 5 Q. And while you were with the firms Hurlburt, Van Volkenburgh & Co. and with Stone, Star & Co. and E. S. Jaffray and Paton & Co. what was the leading spool cotton?

A. J. & P. Coats.

6 Q. State what, in reference to the higher or finer number of J. & P. Coats' cotton, you understood as to the number of cords of the thread?

A. Three-cord.

7 Q. Did you ever understand it was six-cord in the higher numbers?

A. Can I ask a question? Never.

8 Q. What was the general understanding in the trade during the period covered by your experience in spool cotton as to the higher numbers of Coats' cotton being three-cord or six-cord?

A. Always considered the higher numbers three-cord.

9 Q. Did E. S. Jaffray & Co. do an extensive business in spool cotton?

A. We did.

265 10 Q. And Paton & Co.?

A. Paton & Co.'s was not so extensive, of course, as Jaffray's.

11 Q. While connected with any of these firms from 1852 to 1871 did you travel in different parts of the country at any periods in connection with spool cotton?

A. I did not.

12 Q. While with E. S. Jaffray & Co., for example, what percentage, about, was the sale of the higher numbers of Coats' cotton to that of the lower numbers—calling higher numbers above 100?

A. A very small fraction; I couldn't tell how small—what it is.

13 Q. Was the same true while you were with Paton & Co.?

A. Yes, sir.

14 Q. State how you ordered Coats' cotton while with these two firms in general, and particularly how you ordered the higher numbers?

A. From 8 up to 100 we would always order a case; never less than that. From 30, 36, 40, and 50, probably two or three cases, and for the five numbers we would get one case assorted.

15 Q. Have you ever made any comparative tests between Coats' thread and Merrick thread; if so, when and what was the result? I mean in the grade of what we call 200-yard six-cord spool cotton.

A. I have never made a comparison with Merrick's six-cord spool cotton, and never did.

16 Q. What tests, if any, have you made between Coats and Merrick thread?

A. I have just answered I have never made any comparison between Coats' and Merrick's six-cord spool cotton.

17 Q. Did you ever hear any dissatisfaction expressed in the trade with the higher numbers of Coats' thread—those which you say you always understood to be three-cord—on that account?

A. Never.

266 18 Q. Look at the box containing spools, marked Complainant's Exhibit "Box of Comparative Samples," and state which brand of spool cotton, as you see the spools therein, bears the closest general resemblance to Coats' cotton in the appearance of its spools and labels.

A. This one marked Merrick's does, of course; any one can see that.

The testimony of this witness is here seasonably objected to as not in rebuttal, and it is further objected to as making a new *prima facie* case and as incompetent.

Complainant's counsel refers defendant's counsel to the orders of court under which this testimony is being taken and the decision of Hon. E. Henry Lacombe, circuit judge, in regard to the character of testimony which might be taken.

Cross-examined by Mr. WITTER:

19 X Q. When customers inquire for the J. & P. Coats' spool cotton that you have been talking about, what do they ask for; how do they designate it?

A. Well, some customers will ask for J. & P. Coats' genuine; others again simply ask Coats' spool cotton.

20 X Q. That's the name by which it has been known throughout the trade and consumers, so far as you know—Coats' spool cotton—is it not?

A. That's right, as I stated in my previous answers.

21 X Q. By what other name or description, if any, has it been known, so far as you can say?

A. I never knew it by any other name.

22 X Q. Are the other spool cottons also similarly known by their name—for example, I refer to Willimantic, Orr's, and MacNaught, Clark's O. N. T., Clark's Mile-end, Brook's, Kerr's, Merrick's?

A. They are known by their name, Willimantic, or either three or six cord, and Merrick's the same.

267 23 X Q. Were you aware of the fact that George Clark—that is, O. N. T. Clark—also made and sold a three-cord thread—or don't you happen to know that?

A. They all made a three-cord thread in the finer numbers.

24 X Q. I refer to a glazed or polished three-cord thread—in coarse numbers as well as fine—made and sold by O. N. T. Clark. Were you a dealer in or acquainted with that three-cord thread of O. N. T. Clark?

Objected to as immaterial and not called out by the direct.

A. The Clarks, of Paisley; George A. Clark, agent in New York, made and sold a three-cord glasse spool cotton. My memory does not now serve me sufficiently to say whether it was marked O. N. T. or not. I'm not sure of it. I have sold it; lots of it.

25 X Q. The Willimantic also has for years made and sold a three-cord thread in all numbers, as well as the so-called six-cord thread, the finer numbers of which were three-cord. Is not that so?

Same objection.

A. That is so.

26 X Q. What does three-cord mean? Why is the thread marked three-cord, if you know?

A. It's three fine numbers of yarn that are doubled and twisted together.

27 X Q. And six-cord means what?

A. Means that there are six fine yarns that are doubled and twisted together in the same manner as the three-cord—not precisely in the same manner—but nearly so.

28 X Q. All the houses which you have mentioned in your direct examination as having employed you or been associated with you were wholesale houses, were they?

A. Yes, sir.

268 29 X Q. You say in answer to your second question, if I understand you, that since 1871 you have not been a buyer or seller of spool cotton of any name. Is that so?

A. That is so.

30 X Q. Did you know Alexander Knox and were you familiar with the Orr's and McNaught's spool cotton, for which he was agent in this country for many years?

A. I knew Mr. Knox very well. I had very little knowledge of his spool cotton. When I say knowledge I mean that I never examined to see how many threads or test its strength. If a customer asked for it we generally had it for him. We sold very little of it.

31 X Q. What numbers of Coats' 200-yard best thread was in fact six-cord in about 1852, when you began dealing in it.

A. That I can't swear to or will not.

32 X Q. What numbers were six-cord in 1871, when you ceased dealing in spool cotton?

A. That question I cannot answer.

33 X Q. Have they all been labeled and marked alike, so far as you know, from the lowest to the highest number of that Coats' 200-yard so-called six-cord thread, and if there was any difference in the labeling or marking? If so, state when there was any difference and what the difference was.

A. There was a difference in the higher numbers, to the best of my knowledge and belief. The words "six-cord" was omitted; as to the time, along about the period of '70 or '71 or '72; it might be '69. I can't tell.

34 X Q. Do you refer to the spools or boxes, or both, in speaking of the omission of the words "six-cord"?

A. I mean the ticket on the spool.

35 X Q. What appeared in the place of the omitted words "six-cord" on the fine-numbered tickets?

A. I can't say that anything appeared in place of it; it was the word superior spool cotton, I think. I am not sure.

269 36 X Q. You are speaking of the time when you were dealing in the goods, are you?

A. I am.

37 X Q. Have you ever known of any other difference than that you have mentioned in the labels or marks of the finer numbers from that of the coarse in this Coats cotton?

A. I cannot recall any just now.

38 X Q. Do you remember any difference in the labels or flaps connected with the boxes or packages of the fine numbers from the coarse, or were the boxes all marked and labeled alike, "six-cord"?

A. I don't remember whether they both alike were marked six-cord; I cannot say.

Redirect examination by Mr. BETTS:

39 Re-D. Q. What do the words "best six-cord," when used in the trade, indicate as to the grade or quality of spool cotton referred to?

At request of defendant's counsel the examiner notes that after waiting quite awhile and the witness not having answered the question the complainant's counsel asks the examiner to *to* repeat the question.

Complainant's counsel asks the examiner to state as near as he can what "quite awhile" was.

The examiner guesses about a minute and a half.

A. The witness has delayed his answer in order to give a com-

prehensive idea to the question; the word "best six-cord," as applied to J. & P. Coats' spool cotton, simply means that it was the best spool cotton in the market.

JOSEPH E. DALLON.

Sworn to before me this 7th day of January, 1888.

THOMAS HUNT,
Special Examiner.

270 STEPHEN A. FROST, a witness called on behalf of the complainant, being duly sworn, deposes and says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?

A. My name is Stephen A. Frost; my age is sixty-six; I reside in Jersey City, and my occupation, merchant; my business is in New York city.

2 Q. State when you first began to deal in spool cotton—I refer especially to 200-yards cotton known as six-cord—and with what firms you have been connected then and since then.

A. In New York city in 1854, with the firm of Gilbert & Rockwell and successors, three years as salesman; next firm Lathrop, Luddington & Co., one year as salesman; next with Buckley, Sheldon & Co. and successor as salesman and partner until, I think, '75; next with Dunham, Buckley & Co., to December 31, '78, as salesman and buyer; next in my own business since.

3 Q. What has been your business since leaving Dunham, Buckley & Co., and has it related to spool cotton?

A. It has not.

4 Q. State in a general way what your business is now.

A. Selling Indian goods.

5 Q. In 1854, when you went with the firm of Gilbert & Rockwell, what was the leading brand or make of spool cotton in the market?

A. So far as our sales were concerned it was J. & P. Coats.'

6 Q. How was it when you were with Lathrop, Luddington & Co., Buckley, Sheldon & Co., and Dunham, Buckley & Co.?

A. J. & P. Coats.'

7 Q. During all that period between 1854 and 1878 what was your understanding of the number of cords in the higher or
271 finer numbers of J. & P. Coats' best spool cotton and the understanding of the trade on that point?

A. I supposed that it was six-cord up to No. 80.

8 Q. And how many cords in the higher numbers?

A. I supposed it was four-cord to 100 and three all higher.

9 Q. During your experience with Buckley, Sheldon & Co. and Dunham, Buckley & Co. what was the percentage or proportion of the higher number of Coates' cotton? I mean the numbers above 100 to the total sales of Coates' so-called six-cord cotton by those firms. Was it small or large and about what proportion?

A. With Buckley, Sheldon & Co. it was very small; with Dun-

ham, Buckley & Co. we sold more high numbers on account of the introduction of sewing machines, but still the percentage was very small compared with the whole sale.

10 Q. What was the method of ordering Coats' cotton while you were with Buckley, Sheldon & Co. and Dunham, Buckley & Co., especially the finer or higher numbers?

A. I don't hardly understand that.

11 Q. Did you order Coats' cotton by the numbers—as much of each number as you wanted?

A. For the first fifteen years or more we had to order it in full cases of 100 dozen each, selecting the assortment that gave us to the numbers we wanted.

12 Q. How was it since then?

A. Coates' people sold the higher numbers, 100 and above, in packages of ten dozen each, and my impression is that we had to take the 100 dozen.

13 Q. Did you ever hear any complaint made by customers or in the trade of the higher numbers of Coates' cotton on account of not being six-cord?

A. Don't recollect of ever hearing any.

14 Q. Have you ever traveled as a salesman of spool cotton, including Coats'; and, if so, during what period and, in a general way, where?

A. I traveled wholesaling Yankee notions, as we call it, which included spool cotton, previous to 1854, in western New York,
272 and have not traveled since then as salesman, but more particularly to look after collections.

15 Q. Please look at the spools of Coats' thread found in Complainant's Exhibit "Box of Comparative Samples" and also at the other spools in that box and state which manufacture and spools come nearest in resemblance to the Coats' spools in labels and appearance as they stand in the box.

A. These two rows through here resemble each other the most.

16 Q. What are the labels on the two rows you have just pointed out?

A. Merrick Thread Co. and J. & P. Coats.

17 Q. State whether in your opinion the resemblance between those Coats' and Merrick spools you have just pointed out in regard to the upper or black and gilt label and the raised or embossed numbers around it and their general appearance, in your opinion, is calculated to deceive a customer who had no special knowledge of brands and who was not paying special attention to what brand he got?

Objected to as leading.

A. I should think it would deceive him, the purchaser.

The testimony of this witness is here seasonably objected to as not in rebuttal, and it is further objected to as making a new *prima facie* case and as incompetent.

Complainant's counsel refers defendant's counsel to the orders of

court under which the testimony is being taken and the decision of Hon. E. Henry Lacombe, circuit judge, in regard to the character of the testimony which might be taken.

273 Cross-examined by Mr. WITTER:

18 X Q. By what designation is Coats' thread known and asked for in the trade?

A. Coats' spool cotton.

19 X Q. And is it true of the other cottons that they are known and recognized by their names also?

A. I should think it was.

20 X Q. With what 200-yard six-cord cotton have you been familiar since 1864?

A. J. & P. Coats and John Clark, Jr., and later George A. Clark & Brother.

21 X Q. How about Williamantic?

A. I never handled the Willimantic six-cord cotton to any extent.

22 X Q. Why is thread made six-cord. What is the advantage of it?

A. I am not an expert in the manufacture of thread, but suppose it to give it more strength and elasticity.

23 X Q. It brings a greater price than a thread of a less number of cords, does it not?

A. It does.

24 X Q. About twice the price of what is marked and sold as three-cord, does it not, or somewhere near that?

A. Yes; I think so.

25 X Q. The principal makers of thread have from time to time advanced their make of six-cord into higher and higher numbers; is not that so?

A. The sale of six-cord thread in high numbers has increased very much, but I can't say that the thread has been six-cord above 80.

26 X Q. Do you remember the time when it was six-cord only to 60?

A. I do not.

27 X Q. When it was six-cord to 80, were the spools containing thread above 80 and those containing thread below 80 labeled with the same label? I speak of Coats'.

A. I think they were up to 100.

274 28 X Q. And above 100 what change was there in the label, if you recall?

A. I cannot tell, as we sold then very little thread, even to 100.

29 X Q. I suppose you understand in a general way that Coats and some other makers now make their thread six-cord to and including 100?

A. I do not know it of my own knowledge; only from hearsay.

30 X Q. Assuming this to be a fact, why do you suppose they *they* make 90 and 100 six-cord instead of leaving it three? Was it

to give greater strength and elasticity, as you intimated in one of your answers?

A. I suppose it was, and to compete with George A. Clark & Brother.

31 X Q. That is, by getting a better thread in a higher number, was it?

A. I always understood that a six-cord thread had more strength and was better for a sewing machine.

32 X Q. And for hand-sewing as well, have you not?

A. I presume so.

33 X Q. Do you know who to-day makes these 200-yard thread, six-cord thread, in the most numbers?

A. I do not.

34 X Q. Other things being equal, whichever makers should do this would or ought to have an advantage over the others; din't you think so?

A. Yes.

35 X Q. Do you understand that three-cord means thread made of three strands of yarn and six-cord means thread made of six strands of yarn?

A. I understand that three-cord is made of three strands of yarn and six-cord is made of three double strands, which would make it six.

36 X Q. Is there any better thread than six-cord thread, so far — you know?

A. There is not in cotton threads.

37 X Q. I suppose there are seconds in spool thread the same as in other manufactured articles which are sold at less rate than the firsts or best; that is so, is it not?

275 A. I've heard so.

38 X Q. Four-cord thread is better than three-cord in the particulars and for the reasons that you have given for the superiority of six-cord over the three-cord, though less in degree, is it not?

A. We sold a Willimantic spool cotton which was said to be four-cord, and sold it at a higher price than the three-cord kind.

89 X Q. And you also sold it at a less price than Coats' six-cord, did you not?

Objected to as immaterial and as not called out by the direct.

A. We did.

40 X Q. When did the Willimantic make their thread six-cord, if you remember?

Same objections.

A. I do not know; we did not keep it in stock.

41 X Q. Were you acquainted with the fact that after they began to make it six-cord it was some time before they were able to get the Coats six-cord price for it, but sold it for less than that price?

Same objections.

A. I do not know, as I never sold any Willimantic six-cord thread.

42 X Q. Is it your experience as a merchant and familiar with business enterprises that a man who embarks newly in the manufacture of some old-established article often puts it upon the market at a lower price than the well-known goods as one means of getting his goods before the public?

Objected to as immaterial and irrelevant.

A. I think they do.

276 43 X Q. That is the ordinary practice, is it not?

Same objections.

A. It is, either by selling it lower or making a better article.

44 X Q. And frequently both are done at the same time, are they not?

Same objections.

A. Yes.

45 X Q. The business experience and the business connections which you have detailed in your direct examination was in connection with what are known as jobbing or wholesale houses, was it not?

A. Yes, sir.

Redirect examination by Mr. BETTS:

46 Re-D. Q. You speak of six-cord thread bringing a greater price than a thread of a less number of cords. Were you referring to the higher numbers of Coats' best spool cotton in making that answer?

Objected to as leading.

A. I was referring to six-cord thread in general.

47 Re-D. Q. You were comparing what is known in the trade by the name of six-cord thread with what is called three-cord thread as to price?

A. Yes, sir; six-cord, four-cord, or three-cord.

48 Re-D. Q. Suppose a six-cord thread were made of inferior cotton, would the number of cords, being six, make it what you consider equal to what is best six-cord in the trade?

A. I should think not.

49 Re-D. Q. Would the same be true if the manufacture were inferior, even though the number of cords were six?

A. I should think it would.

277 50 Re-D. Q. Have you ever made a test to ascertain what was the number of cords in Coats' thread in numbers up to 100?

A. I think not so high as 100.

51 Re-D. Q. Up to what number, if you remember?

A. 80.

52 Re-D. Q. Was it six-cord?

A. Yes.

53 Re-D. Q. What do the words "best six-cord" on spool cotton indicate to you in the trade?

A. Indicate that it was as good or better than any other cotton made; spool cotton I mean, of course—any other spool cotton.

Recross-examination by Mr. WITTER:

54 Re-X Q. The best spool cotton is six-cord, isn't it?

A. We always considered it so when I sold cotton.

55 Re-X Q. And when you see the words six-cord on a spool of thread you are warranted in supposing that the thread is six-cord, are you not?

Objected to as hypothetical.

A. No; I was not. I supposed it to be six-cord up to and including No. 80.

56 Re-X Q. Did you ever see the words six cord upon a spool of thread that was not in fact six-cord? Did you ever, do you think; if so, on what spools?

A. My impression is that I have seen it many times on cotton that was only two-cord.

57 Re-X Q. Did you think that was honest?

Objected to as immaterial.

A. I thought they was trying to sell it on somebody else's reputation.

58 Re-X Q. Did you think it was honest to mark it six-cord when it was really only two-cord?

Objected to as incompetent and immaterial.

278 A. I think it was dishonest.

59 Re-X Q. And it would have been dishonest, would it not, to mark it six-cord, when it was only three-cord, would it not?

Objected to as incompetent and immaterial and hypothetical.

A. I think it is deception, and I think deception is dishonesty—or would-be deception.

60 Re-X Q. You said you tested some of Coats' thread and found it six-cord. How did you test it?

A. By counting the threads of yarn.

61 Re-X Q. That process is more and more difficult the finer the number the thread is. Is not that so?

A. I suppose it is.

62 Re-X Q. And it would be not easy to pick out and count the separate strands of thread as high as 100, would it?

A. Probably not without a glass.

This line of examination is objected to, as the witness has stated in his testimony that he never made the examination in numbers higher than 80, so that it is a matter of opinion on his part.

63 Re-X Q. And to pick out and count the strands of No. 150 would be quite a job even with a glass, would it not, in your opinion?

A. The finer the thread the more difficult it would be.

64 Re-X Q. I notice that there are numbers stamped on the rim of spools of Merrick's six-cord thread; what do those numbers stand for?

Objected to as not called out by the redirect.

A. I don't remember ever seeing any spools with those numbers on as long ago as I sold cotton.

279 65 Re-X Q. What do you think those numbers stand for?

Same objection and a- immaterial.

A. I should suppose from the label that they stand for the number of the cotton.

66 Re-X Q. These wooden numbers would be useful to determine the number of the thread if the label were lost off or defaced, would they not?

Same objections.

A. I should think they would.

67 Re-X Q. You never tested Coats' thread above No. 80 to ascertain the number of strands, did you?

A. I do not think I ever did.

STEPHEN A. FROST.

Sworn to before me this 7th day of January, 1888.

THOMAS HUNT, *Sp. Ex'r.*

Examination adjourned to Monday, January the 9th, 1888, at 10.30 a. m.

NEW YORK, *January 9th*, 1888—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Examination adjourned to 2 p. m.

280 WALTER MILLER, a witness called on behalf of the complainants, being duly sworn, says:

1 Q. What is your name, age, residence, and occupation?

A. My name is Walter Miller; my age is 28; I reside at No. 137 Macdougal street, New York city; I am a salesman.

2 Q. Salesman for whom?

A. For George A. Clark & Brother, manufacturers of O. N. T. spool cotton.

3 Q. How long have you been a salesman for that firm, and what has been the nature of your duties?

A. I have been a salesman for George A. Clark & Brother. I have had charge of the city retail trade for the last five years. About a year or a year and a half, perhaps, I have had charge of the State of New Jersey.

4 Q. Did you have anything to do with spool cotton before going with George A. Clark & Brother; and, if so, what?

A. Nothing whatever, sir.

5 Q. During the time you have been with that firm have you been familiar with the various brands of spool cotton on the market? And mention those you have came in contact with?

A. To the first question, yes, sir; I have run across Coats, Mileend, Willimantic, Kerr, Merrick, and Hall and Manning.

6 Q. State what make of spool cotton, in your experience and opinion, in the appearance of its spools and labels bears the closest resemblance to Coats' spool cotton?

A. Merrick's.

7 Q. In your opinion is that resemblance so close as to be calculated to deceive a customer who was not paying special attention to carefully examine the spools he purchased?

A. I think it is.

281 8 Q. What class of dealers in spool cotton do you come in contact with as salesman of George A. Clark & Brother?

A. Retailers.

9 Q. Do you mean those who themselves sell direct to the consumer or user?

A. Yes, sir.

10 Q. Can you mention any case in which the question of similarity between Coats' and Merrick's spools came up in your dealing with any retailer? And, if so, give his name and state where and when it was and what was the occurrence.

A. Yes, sir; Henry Cumming, of Washington, New Jersey, told me that he thought he could sell Merrick's thread in the place of Coats' because the spools looked so much alike. This happened about a year ago. He had at that time put in Merrick's thread in place of Coats'.

Objected to as hearsay evidence.

11 Q. Where did this conversation with Henry Cumming occur?

A. In his store.

12 Q. How did you happen to be there?

A. My duties as a salesman taking me there to drum up trade for George A. Clark & Brother.

13 Q. State whether you had been there before and whether you knew of Cumming keeping Coats' cotton in stock before the time of this conversation.

A. Yes, sir; I was there before, and he kept Coats' principally.

14 Q. Of how many cord have you understood Coats' cotton to be in the higher numbers—namely, above 100?

A. Three-cord.

15 Q. Is that the general understanding in the trade as far as your experience goes?

A. Yes, sir.

282 16 Q. How many cords is George A. Clark's in the higher numbers, above 100? I am speaking of 200-yard spools of so-called six-cord cotton?

A. Three-cord.

17 Q. State whether the sale of the higher numbers—say above

100—of spool cotton is small compared with the sale of the numbers below 100.

A. Very much smaller.

18 Q. Do you know whether the Merrick thread sells for a lower price than Coats'—than Clark's?

A. Yes, sir.

19 Q. Is this true also of the higher numbers, above 100?

A. Yes, sir; the price is the same for all numbers.

The testimony of this witness is here seasonably objected to as not in rebuttal, and it is further objected to as making a new *prima facie* case and as incompetent.

Complainant's counsel refers defendant's counsel to the orders of court under which this testimony is being taken and the decision of the Hon. E. Henry Lacombe, circuit judge, in regard to the character of testimony which might be taken.

Cross-examined by Mr. WITTER:

20 X Q. State just what you mean when you say that Merrick's thread calls for less than Clark's or Coats'. State to whom it sells for less and in what quantities.

A. Your first question: I have seen it billed for 42 cents net to Murray & Griffith, of Trenton, New Jersey; Coats' and Clark's O. N. T., net, 46¾ cents. The Merrick's bills that I seen were for any quantity from a few dozen up to a hundred.

21 X Q. Do you mean that Murray & Griffith buy direct from George A. Clark & Brother at 46¾ net, or is it through some jobber?

A. They buy from George A. Clark & Brother direct.

283 22 X Q. Which is the newer six-cord thread upon the market, Merrick's or Clark's?

A. Clark's, in the 200-yards spools.

23 X Q. I don't think you understand the question. Which has been longest upon the market, the Clark's six-cord 200-yard thread or the Merrick's?

A. I can't say.

24 X Q. How long have you known of the Clark's?

A. About 15 years.

25 X Q. And have you known of the Merrick's 200-yard six-cord as long as that?

A. No, sir.

26 X Q. About how long have you?

A. Probably six or seven years.

27 X Q. Who are Murray & Griffiths, of Trenton?

A. Jobbers in Yankee notions.

28 X Q. Do they not sell spool thread at retail?

A. No, sir.

29 X Q. Do you recognize the spool of thread I now hand you as the 200-yard six-cord thread of Clark's with which you say you have been familiar for 15 years?

A. Yes, sir.

30 X Q. How do you recognize it?

A. I recognize it by the top label. The bottom label looks as though it weren't put on by our folks.

31 X Q. What is there on the top label that makes you recognize it as Clark's?

A. The words George A. Clark and the general appearance of the label.

32 X Q. The words George A. Clark, where?

A. On the label; on the top of the label; on the outer edge of the label.

33 X Q. Is that an unusual place for the name of the maker?

Immaterial and not called out by the direct.

A. I haven't noticed whether they generally put the name on the top or the bottom of the label.

284 34 X Q. They always put their name on the top label, don't they?

Same objections.

A. All the principal manufacturers do.

35 X Q. Clark's top label is a circular label, is it not?

Same objections.

A. Yes, sir.

36 X Q. And so is Coats', is not it?

A. Yes, sir.

37 X Q. Clark's top label is black and gold, is it not?

Objected to as immaterial.

A. Yes, sir.

38 X Q. And so is Coats', is not it?

Same objection and as not called out by the direct.

A. Yes, sir.

39 X Q. Clark's top label is of circular rings in black and gold, is it not?

A. Yes, sir.

Objected to as immaterial and not called out by the direct and the exhibit speaks for itself.

A. Yes, sir.

40 X Q. And so is Coats', is not it?

Same objection.

A. Yes, sir.

41 X Q. Clark's top label has on the outside the name of the maker, hasn't it?

Same objection.

A. Yes, sir.

285 42 X Q. And so has Coats', hasn't it?

Same objection.

A. Yes, sir.

43 X Q. And Clark's has the description of the thread as best six-cord on the top label, hasn't it?

Same objection.

A. Yes, sir.

44 X Q. And so has Coats', has it not?

A. Yes, sir.

45 X Q. And Clark's top label has the length of the thread, 200 yards, has it not?

Same objection.

A. Yes, sir.

46 X Q. And so has Coats', hasn't it?

Same objection.

A. I am not certain whether Coats' has 200 yards on all or not.

47 X Q. On what numbers do you think 200 yards may not appear in Coats'?

A. I don't know. Come to think of it, I think it is 200 yards on all of them. I'm not so familiar with Coats' label.

48 X Q. And Clark's top label has the number of the thread upon it, has it not?

Same objections.

A. Yes, sir.

49 X Q. And so has Coats', has it not?

Same objections.

A. Yes, sir.

286 50 X Q. How long have you known these facts touching the labels—how many years?

A. More than ten years on O. N. T. and five or six on Coats'.

51 X Q. Can you mention anything else that is upon either of these two labels?

Same objections.

A. Sole agent on O. N. T.

52 X Q. Anything else?

Same objection.

A. No, sir.

53 X Q. So far as you know, have the Coats Company complained of the Clark's people using their black and gold label?

Same objections.

A. Not to my knowledge.

54 X Q. A circular black and gold label, bearing substantially the same information upon it—that is, describing the maker, the quality, the length, and the size—is found upon the Kerr spools, is it not?

A. Only recently.

55 X Q. How recently?

Same objections.

A. About a year and a half to my recollection; two years, perhaps.

56 X Q. And likewise upon the Willimantic, is it not, except the description of the quality?

Same objections.

A. Yes, sir.

287 57 X Q. And all this descriptive matter was found upon all black and gold circular labels of the Orr's and McNaught thread, was it not?

Same objections.

A. Orr and McNaught was before my time in the business.

58 X Q. George Clark uses the same black and gold label on the black and colored thread as on the white, does it not?

Same objections.

A. Yes, sir.

59 X Q. And likewise the Coats and Willimantic and Merrick, don't they?

Same objections.

A. Yes, sir.

60 X Q. The Willimantic and the John Clark black and colored threads are wound upon white spools, are they not?

Same objections.

A. Yes, sir.

61 X Q. Does the fact that two spools are of the same color make the articles look more alike on the market; what is your opinion about that?

A. I could tell them apart if I see them.

62 X Q. Does the fact that two spools are of the same color—that is, both white—make the articles look more alike in the market than if one were black and the other white?

A. Yes, sir.

63 X Q. The Coats' black and colored thread is wound upon white spools, is it not?

A. Yes.

288 64 X Q. Does George A. Clark mark their thread anywhere, so far as you know, with the words six cord from 8 to 200?

A. No, sir; they mark from 8 to 100 six-cord.

65 X Q. Why don't you mark them from 8 to 200 six-cord?

A. From 100 to 200 is three-cord.

66 X Q. It would be cheating, would it not, if you should send out your thread to the public saying it was six-cord from 8 to 200 when you knew it was three-cord from 100 to 200 and not six-cord?

Defendants' counsel requests complainant's counsel if he has any objection to make to this question that he will make it out of the hearing of the witness so that there may be no danger of the witness being introduced by counsel. Defendants' counsel says that the witness having just asked if he may see the box of No. 120 Clark's white thread, the counsel at first said no, but now hands the box to the witness and asks the examiner to mark it Defendants' Exhibit "Clark's No. 120 White Thread, January 9th, 1888, T. H., sp. ex."

Complainants' counsel in the hearing of the witness objects to the question as incompetent, calling for a mere opinion not called out by the direct.

A. It would be cheating, but we advertise six-cord from 8 to 100 on advertising matter that we send out to the public.

67 X Q. But you say "warranted six-cord" on this box of 120, don't you?

Objected — as immaterial and as not called out by the direct.

A. The labels are printed all alike for all boxes.

68 X Q. It doesn't say 120 on all boxes, does it?

A. I meant the top of the cover, not the end.

289 69 X Q. The top box labels are not the same in size, are they?

Same objection as above.

A. No, sir.

70 X Q. What does the figures 18 mean on the bottom of that top label?

Same objections.

Complainants' counsel informs the witness that he need not disclose any private business mark, if this is such.

A. I don't know.

71 X Q. Does it appear on the labels of other sizes of boxes?

Same objections.

A. No, sir.

72 X Q. Then the box labels are different in that respect, are they not?

Same objections.

A. Regarding that particular number.

73 X Q. Will you now try again to answer cross-question 68, which reads as follows: "But you say warranted six-cord on this box of 120, do you not"?

Same objection.

A. Yes, sir.

74 X Q. And the same on the other numbers higher than 100, don't you?

Same.

A. I believe so.

290 75 X Q. Is there any better cotton than six-cord that you know of?

A. There is none that I know of.

76 X Q. That is why it is called the best, isn't it?

Objected to because it is not called "the best" but "best" six-cord.

A. There is a distinction in my mind. My understanding is that it is called "best" on account of the brand.

77 X Q. Isn't it called "best" because it is best?

A. No, sir.

78 X Q. What is there better?

Objected to as indefinite.

A. There is nothing better than the best six-cord.

79 X Q. Is that why it is called the best six-cord?

Same objection as to question 76.

A. I think I have answered that question once.

80 X Q. Please answer it more fully and state why it is called best, if not for the reason that it is best.

Objected to on the same ground as above, and because the question does not refer to any particular brand or make of spool cotton. Defendants' counsel says he refers to the Clark brand—George A. Clark—as exhibited in number 50, Complainants' Exhibit "Box Comparative Samples," upon which the words "best six-cord" appear.

A. We mean by that ours is the best six-cord in the market. That is what I have been trying to convey to the questioner.

81 X Q. Best as compared with whose?

Same objections.

A. Any of the manufacturers.

291 82 X Q. Is that what you meant in answer to cross-question 76 when you said, "My understanding is that it is called best on account of the brand"?

Same objection.

A. Yes, sir.

83 X Q. And do you suppose that the Coats and other makers use that language, best six-cord, with the same signification?

Objected to as incompetent, immaterial, and hypothetical.

A. I don't know about Coats' business. I was thinking of O. N. T.

84 X Q. Did you ever know of those words being used with any other signification; if so, what?

Same objection.

A. I cannot tell.

85 X Q. (Question repeated.)

Same objection.

A. I don't know why the other manufacturers use it.

86 X Q. Not any of them?

Same objection.

A. No, sir.

Examination adjourned to January 10th, 1885, at 10.30 a. m.

292 NEW YORK, *Jan'y 23d*, 1888—11 a. m.

Met pursuant to notice.

Present: Counsel as before.

WALTER MILLER, being further cross-examined by Mr. WITTER, says:

87 X Q. In answer to cross-question 30, having been shown the spool of Clark's No. 100 thread from Complainants' Exhibit Box of Comparative Samples, you said as follows: "The bottom label looks as though it weren't put on by our folks." Can you state what it is about the bottom label that makes it look as though it wasn't put on by your folks?

A. When we first made fast-black thread there was a private mark put on the label to distinguish the old black from the new black. The spool of thread that I looked at was a spool of white thread. The chances are that this label was put on this spool by mistake, in their factory, of course.

88 X Q. Of how many cords is the best thread; of six or three?

A. The best thread is supposed to be six-cord.

89 X Q. What are the qualities which, in your judgment, make the best thread, aside from color and number of cords?

A. I cannot answer it. It would take an expert or somebody working in the mill. I couldn't answer it.

90 X Q. Strength is one of the the qualities necessary, isn't it, in the best thread?

A. Yes.

91 X Q. And smoothness is another, isn't it?

A. I believe so.

92 X Q. You said that your conversation with Mr. Cumming happened about a year ago. Can you state what month it was?

A. No, sir.

293 93 X Q. Was it in the fall or winter of 1886?

A. Can't say.

94 X Q. Did you make any written memorandum of your conversation?

A. No, sir.

Redirect by Mr. BETTS:

95 Re-D. Q. Of how many cords is the best thread in the higher numbers above 100?

A. Less than six-cord.

96 Re-D. Q. State whether the words "best six-cord" on George Clark's spools mean that it is the best thread your company make.

Question objected to as leading.

A. I believe so.

Recross-examined by Mr. WITTER:

97 Re-X Q. In answer to question 95 you say that the best thread in the higher numbers above 100 is less than six-cord. The Merrick thread in numbers above 100 is six-cord, is it not?

A. I don't know, sir, whether it is or not?

98 Re-X Q. You have heard so, have you not?

A. No, sir.

99 Re-X Q. Will you look at the box of thread Defendants' Exhibit No. 21 and see if it is not marked six-cord both upon the box and upon the label, and then examine the thread and see if it be not in fact six-cord?

Objected to as immaterial and as not called out by the redirect.

A. I can't answer the question. It might be number fifty thread marked up. I can't tell the thickness of the thread by looking at it. I mean the size. It is marked six-cord on the box and on the labels.

294 100 Re-X Q. Have you really any doubt but that this thread marked six-cord upon the box of Defendants' Exhibit No. 21 is really what it says, six-cord?

A. Yes, sir; I have.

101 Re-X Q. What is the doubt? Express it.

A. I have been told by people in the thread business that the very fine numbers cannot be made in six-cord—that is, to get the fineness and the size. Personally I have no knowledge of it.

102 Re-X Q. Won't you untwist the thread on one of these spools and satisfy yourself whether it is six-cord or not?

A. No, sir; I don't care to.

WALTER MILLER.

Sworn to and subscribed in my presence this 23d day of January, 1888.

THOMAS HUNT,
Special Examiner.

Recess to 2 p. m.

295 NEW YORK, *Jan'y* 10, 1888—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

LEROY B. COX, a witness called on behalf of the complainant-, after being duly sworn, deposes and says:

1 Q. What is your name, age, residence, and occupation?

A. My name is Leroy B. Cox; I am 42 years of age; I reside in 3168 Groveland avenue, Chicago, Illinois; I am a traveling salesman for Thomas Russell & Co., sole agent, Clark's Mile-end spool cotton.

2 Q. State what experience you have had in dealing in spool cotton, when it began, how long it continued, and with what firms.

A. I have been with Thomas Russell & Co. 14 years. I am still with them, and have been selling spool cotton constantly for 14 years; never represented any one else in that line. I have been handling spool cotton ever since 1865; sold it over the counter, at retail, when a boy; not always in Chicago, however; been connected with Thomas Russell, with headquarters at Chicago, all these 14 years, selling to jobbers and to large and small retailers, in many instances taking orders for the jobbers and from small dealers, sending such orders to the jobbers as they might designate—as the small dealers designate.

3 Q. State whether you have been traveling as a salesman during the whole time you had been with Thomas Russell, agent for Clark's Mile-end cotton, and what territory you have covered during that period.

A. Yes, sir. I have been over the whole Northwest nearly, largely in Minnesota the first part of my experience, considerable in Wisconsin, considerable in Dakota, quite general in Iowa, some in Illinois, some in Indiana, very little — Missouri, considerable in Nebraska; have been through as far as Denver once.

296 4 Q. In your experience, which has been the leading spool cotton in the territory you have covered, as far as amounts of sales have gone?

A. The Coats'—J. & P. Coats'. In the southern part of Indiana, I think, there may be as much O. N. T sold.

5 Q. State whether you have been familiar with the various makes or brands of spool cotton on the market and mention those you have come in contact with.

A. Yes, sir. J. & P. Coats', Clark's Mile-end, formerly known as John Clark Jr.'s; Clark's O. N. T., Brooks', Merrick's, Kerr's, Chadwick's, and numerous cheap brands, principally three-cord. I should add, also, Willimantic.

6 Q. Which make of spool cotton, in your experience, bears the closest resemblance to Coats' cotton in the appearance of its labels and spools?

A. Merrick's in spools. It would be difficult to find many merchants who would detect it in their thread—the twist of threads.

7 Q. Is the resemblance between the Coats' and Merrick's spools such as, in your opinion, is calculated to deceive an ordinary purchaser who was exercising no very special care?

A. Emphatically so.

8 Q. Do you remember about when the Merrick thread, in its present appearance of spools, first came under your observation in the territory you cover?

A. About three years and a half or four years ago, I think.

9 Q. Do you remember something being said in the trade, at that time or since, in regard to the similarity of Coats' and Merrick's spools; and, if so, what?

Objected to as calling for hearsay.

A. Yes, sir; it was quite generally stated among the trade that they could sell Merrick's spool cotton as well as Coats', mainly on account of the spool being similar; also on account of its being cheaper.

297 10 Q. Were such statements as above detailed made to you?

Same objection.

A. Yes, sir.

11 Q. And by what class of dealers?

A. Retail dealers; principally the smaller class.

Same objection.

12 Q. By retail dealers do you mean those who sold directly to consumers in quantities as small as, sometimes, a few spools?

Same objection and as indefinite.

A. That's what I mean.

13 Q. State whether this statement that you have referred to in your ninth question was made to you at different places in your territory?

Same objections.

A. Yes, sir.

14 Q. State what your method of dealing with those you have called retailers in regard to spool cotton is. I mean how you visit them and how it happens they make statements to you in regard to spool cotton?

Same objections.

A. It has been my duty ever since I have been with Thomas Russell & Co., sole agents Clark's Mile-end spool cotton, that upon visiting a town to call upon all merchants, both jobbers and retailers, large and small. In many instances I have carried a cabinet front representing the style of our cabinets and showing them to all dealers, soliciting orders for the same either direct to Thomas Russell & Co. for direct buyers, taking orders of 100 dozen or under, in cabinets or out, in solid dozens, usually sending the smaller orders to any jobber who the buyer might designate.

298 15 Q. In your experience, of how many cord have you understood the higher numbers, say those above 100, of Coats' thread to be?

A. Three-cord.

16 Q. How about the higher numbers of Clark's O. N. T. and Clark's Mile-end and Willimantic, as to number of cords?

A. Do you mean above 100? I have always understood they were three-cord.

17 Q. Referring to Coats' thread, is it the general understanding in the trade, as far as you know, that it is three-cord above 100?

Objected to as immaterial.

A. Yes.

18 Q. What do you understand by the term best six-cord, as applied to thread—what grade or quality of thread does it indicate in the trade?

A. I understand that it's made of the very best material that can be procured; that it is made into six-cord cotton.

19 Q. What proportion, about, does the sale of the numbers above 100 of spool cotton, the leading makes, such as Coats, the two Clarks, and Willimantic, bear to the total sales of all numbers?

Objected to as immaterial.

A. A fraction of less than one per cent., in my judgment.

The testimony of this witness is here seasonably objected to as not in rebuttal, and it is further objected to as making a new *prima facie* case and as incompetent.

Complainants' counsel refers defendants' counsel to the orders of court under which this testimony is being taken and the decision of Hon. E. Henry Lacombe, circuit judge, in regard to the character of testimony which might be taken.

299 Cross-examined by Mr. WITTER:

20 X Q. Clark's Mile-end thread in black and assorted colors is wound upon what colored spools?

Objected to as immaterial.

A. The white on black spools; black and colored on white spools.

21 X Q. Does the fact that the black and colored thread of Clark's Mile-end is wound on white spools make the article, as a whole, more like the Clark's O. N. T. in black and colors or not?

Objected to as immaterial and not called out by the direct.

A. Not necessarily so; please read the question again. (Upon rereading the question to the witness he continues). That's my answer.

22 X Q. Does the fact that the black and colored thread of Clark's Mile-end is wound on white spools make the article, as a whole, more like the Clark's O. N. T. in black and colors than if the former were wound on black spools?

Same objections.

A. No, sir.

23 X Q. And no more likely to be taken one for the other?

Same objections.

A. No, sir; not by any one who understands what they're buying.

24 X Q. I mean by the ordinary consumer.

Same objections.

A. I think not.

300 25 X Q. Do the Clark Mile-end, Clark's O. N. T., Coats', and Willimantic sell their 200-yard six-cord thread at the same price?

Same objections.

A. Supposed to; exactly, and do for all I know.

26 X Q. What do you mean by supposed to?

Same objections.

A. They are combination goods, and I have never known any of the companies violating the combination as above named.

27 X Q. Would it be a violation, as you understand it, of the combinations to sell below the agreed price?

A. Yes, sir.

28 X Q. What is the agreed or combination price?

Same objections.

A. To sell the goods at 55 cents a dozen, less six per cent. cash, in 30 days. In cases where 1,000 dozen are purchased in 6 months from 1st of January to the 30th of June, or from July 1st to 31st of December, such buyer is paid a bonus and whatever freights he has paid out besides guarantee in the price on stock in hands of customers of any goods bought during the season.

29 X Q. How long has that combination lasted between the two Clarks, the Coats, and the Willimantic?

Same objections.

A. The Willimantic were the last brought into the combination—last came into the combination, but Coats', Clark's, Clark's Mile-end, O. N. T. have been combination goods for 15 to 18 years, to my knowledge.

30 X Q. When was the Willimantic brought in or when did it come in? I mean about when, without being exact, unless you can be exact.

Same objections.

301 A. I think about three years ago.

31 X Q. Previous to the time when the Willimantic became one of this combination it sold its thread at a less price than the Coats and two Clarks, did it not?

Objected to as immaterial and not called out by direct.

A. Yes, sir.

32 X Q. How much less?

Same objections.

A. Six per cent., I think.

33 X Q. And earlier in their progress the Willimantic and while a comparatively new company their thread sold at still less than the six per cent., less than the combination price, did it not?

Same objections.

A. Not to my knowledge for six-cord thread.

34 X Q. We are talking only of 200-yard six-cord thread. How long, so far as you remember, did the Willimantic sell this thread

at six per cent. less than the combination price before they were brought into the combination? I mean about how long.

Same objection.

A. I think I can modify the question—came in or brought in—I don't know that they were brought in. I think about three or four years.

35 X Q. The Merrick Thread Company is not a member of this combination, is it?

Same objections.

A. It is my understanding, not.

36 X Q. And they have a right to sell their thread at any price they choose without violating the agreements of the combination, have they not?

A. I should presume they had.

302 37 X Q. You have spoke of a difference in price between the Merrick's and the combination price. Who gets the benefit of that difference—what class of trade?

Same objections.

A. I am not aware that we have mentioned any difference in price between the Merrick's and the combination. We have discussed the Willimantic.

38 X Q. I understood you to refer to it in your answer to the 9th question.

Same objections.

A. I don't think that referred to the question of combination price.

39 X Q. What price were you in that answer comparing Merrick's with when you referred to Merrick's as being cheaper? You may look at the question and answer.

A. Mainly the price we sold to small dealers at and small lots of 100 dozen and under.

40 X Q. Now, please state who gets the benefit of this difference in price between Merrick's and the combination price for 100 dozen or under. Is it the small dealers you have referred to or who?

Objected to as immaterial.

A. The small dealers mainly; sometimes the consumer, when it is sold six spools for 25 cents.

41 X Q. The consumer throughout the country pays five cents a spools for 200 yard six-cord thread at the present day, whether it is Coat's, Merrick's, Clark's, or Willimantic. If you know any instance where this is not true, please give the name and address.

Same objection.

A. I can only speak for the territory which I cover. That
303 in all instances is not a fact. I have heard repeatedly of threads being sold six for a quarter, but doubt if I could

name any one special man for doing so. Yes; I can, I think. "The Bee Hive," in Chicago. They have advertised it six for a quarter.

42 X Q. In answer to question 14 you speak of sending smaller orders to the jobbers whom the buyer may designate. Why do you pursue that practice?

A. That's a way we have of doing business.

43 X Q. Why do you do business in that way and to whose advantage is it that it is so done?

A. It aids the jobbers in disposing of more goods.

44 X Q. And helps the jobber to sell within the limited time the amount which enables him to claim the 9 per cent., &c.; is that so?

A. Most of our jobbers make it, any way.

45 X Q. And it increases the sum total to which the 9 per cent. amounts with the individual jobber, does it not?

A. Yes, sir.

46 X Q. I notice that Clark's Mile-end label in numbers below 100 says six-cord on it. You say that above 100 that the cotton is three-cord. Is it marked three-cord on the spool or box?

A. No, sir; it is not on the spool.

42 X Q. Nor on the box, so far as you recollect, is it?

A. It may possibly be on the box; it is not on the spool.

43 X Q. I notice that on the spool in numbers above 100 the words six-cord are not used, but the words best spool cotton appear. Do you think that is a sufficient difference from the word six-cord which appears on the lower numbers to guard the public, the sewing women, etc., against supposing that the higher numbers are six-cord? You may look at the spools if you wish.

Objected to as immaterial.

A. It simply corroborates my former statement. I don't think one sewing woman in the country would ever investigate it or look at it or think of it.

304 44 X Q. Do you think the difference is sufficient to guard you from supposing the higher numbers to be six-cord, assuming that you have no knowledge or understanding that they were three-cord?

Objected to as hypothetical.

A. I don't think that I should investigate it.

45 X Q. What do you suppose that difference exists for?

A. My understanding is that is for the finer work, such as embroidery and laces.

46 X Q. What do you suppose that the numbers up to 100 are marked six-cord for, while the numbers above 100 are not marked six-cord, but are marked best spool cotton? In other words, why are not the numbers above 100 marked six-cord on the spool?

A. For the simple fact that we claim to make them six-cord. This is my answer to the first part of the question. We never claimed to make them six-cord above 100.

47 X Q. Why are not the numbers above 100 marked six-cord on the spool? Is it because they are not in fact six-cord?

Objected to as already answered.

A. I have just answered that question.

48 X Q. Did you say that it is because they are not six-cord?

A. I said we never claimed they were six-cord above 100, but have claimed them to be three-cord.

49 X Q. Do you think it would be wrong to claim them to be six-cord when they were in fact three-cord?

Objected to as incompetent and immaterial.

A. I certainly do.

50 X Q. Why?

Same objection.

305 A. For the simple reason that we are not in the habit of misrepresenting.

Examination adjourned to 2 p. m

2 P. M.

Continuation of cross-examination:

51 X Q. You say, in answer to X Q.'s 48, 49, and 50, that you think it would be wrong to claim thread to be six-cord which is, in fact, three-cord. Do you think it would also be wrong to mark thread with the words "six-cord" on spool when, in fact, the thread upon the spool was not six-cord, but three-cord? And, if you do think so, say why.

(Objected to as incompetent and immaterial.)

A. I claim we have done no such thing. I think it would be wrong to mark a three-cord thread six-cord if — were not six-cord.

42 X Q. Why?

Same objection.

A. I answered that once or twice before; because it would be misrepresenting a three-cord thread as six-cord.

53 X Q. Which cost the most to make—six-cord thread or three-cord thread of the same number, material, and length of thread? And state why, generally.

A. I can't answer that question understandingly, never having had anything to do with the manufacture.

54 X Q. But it is a fact and well known that six-cord thread costs more to make than three-cord thread, is it not, of a given number, plait, and material?

Objected to, as the witness has stated he does not know.

A. I would naturally suppose it was a fact.

306 55 X Q. If the Merrick Thread Company's 200-yard thread in numbers above a hundred was three-cord and they should mark it six-cord would you think that was dishonest?

Objected to as incompetent.

A. Yes, sir.

56 X Q. But if it were, in fact, six-cord and they should mark it six-cord that would be perfectly proper, would it not?

Same objection.

A. I think so; it would.

57 X Q. Are you aware of the fact that the Merrick Thread Company's thread in numbers above one hundred is not six-cord and marked six-cord?

A. I am not. I know they claimed it to be such. I never examined it.

58 X Q. How long has the Clark Mile-end 200-yard thread been six-cord up to and including 100 and three-cord from 110, inclusive, upwards?

A. I have always understood it to be such since my connection with the firm of Thomas Russell & Co.

59 X Q. Why don't they make 110 six-cord?

A. I am unable to inform you.

60 X Q. What is the advantage of six-cord over three-cord thread of the same material?

A. My understanding of it is that the extra three cord adds strength to it.

61 X Q. Whenever a maker advances its six-cord make it takes pains to have it known, does it not?

A. He might possibly use it as an advertising scheme, but there's so little of it used I don't think it would amount to much.

Defendants' counsel offers in evidence a box of thread which is marked on the top of the box "John Clark, Jr., & Co.'s best six-cord" and with a circle containing the words "Clark's Mile-
307 end spool cotton, trade-mark;" at the top of the label, "established 1820," and at the bottom of the label, "warranted 200 yards;" on the end of the box cover, "Clark's Mile-end spool cotton, 110, black;" on the bottom label the following: "John Clark, Jr., & Co.'s best six-cord, Clark's Mile-end spool cotton, trade-mark, extra quality, for hand and machine sewing. All numbers warranted six-cord from 8 to 100." The said box of thread is marked "Defendants' Exhibit John Clark, Jr., & Co.'s Mile-end 110 Spool Cotton, 1 Dozen, January 10th, 1888, T. H., sp. ex'r."

Objected to as immaterial.

62 X Q. Do you recognize the said box of thread marked "Defendants' Exhibit John Clark, Jr., & Co.'s Mile-end 110 Spool Cotton, 1 Dozen" as a box of thread of No. 110, such as Thomas Russell & Co. are the agents for the sale of; and, if you do, why, as you understand it, do the words best six-cord appear on the top of that box?

Objected to as immaterial.

A. I recognize the box and the cotton it as Clark's Mile-end spool cotton No. 110, black; I also discover it's not very fresh goods.

I have already stated once previous in my testimony that it might

possibly appear to read six-cord on the box where it does not appear to read six-cord on the spool. In making the quantity of boxes which the Mile-end Spool Company must — I presume the boxes are got out to appear as uniform as possible.

63 X Q. But the thread in the box is, as you understand it, really three-cord thread, is it not?

A. Yes, sir.

64 X Q. You say you discover the goods are not very fresh. What do you mean by that?

A. I mean the goods are not of our more recent dye.

308 65 X Q. Will you now look at the flap inside the box and read what is said thereon?

Objected to as immaterial.

A. The first line, "established in 1820," John Clark, Jun'r, & Co.'s; circle, "Clark's mile-end spool cotton, trade-mark, machine, six-cord, warranted 200 yards."

66 X Q. Will you now examine each spool of thread in the said box marked Defendants' Exhibit "John Clark, Jun'r, & Co.'s Mile-end 110 Spool Cotton, 10 Doz., Jan'y 10, 1888, T. H., sp. ex'r," and particularly the gilt and black label upon each spool, and state whether you do not find upon said label upon each of the twelve spools the words six-cord and the number 110, together with the name of the maker, John Clark, Jun'r, & Co., &c.? I desire this to be done with care.

Objected to as immaterial.

A. That's correct. I have an explanation to offer in that particular. As stated before, this is not a fresh box of goods. The name appears on these spools as Thomas Russell, sole agent. The flaps on the inside is different from the goods we are now producing. In my judgment these are goods put up several years ago, when Thomas Russell alone was sole agent. The firm is now Thomas Russell & Co., sole agents. Our labels differ, and the appearance of our boxes are slightly different in wording.

67 X Q. Do you find the words six-cord and the number 110 upon each of the said twelve spools as asked in the last question?

Same objection.

A. Yes, sir.

68 X Q. Do the No. 110 spools of to-day have Thomas Russell & Co. on them instead of Thomas Russell?

Same objection.

309 A. I don't think either of the names is mentioned on the finer numbers of to-day.

70 X Q. Look at each of the six fine-number spools of Clark's Mile-end, Nos. 110, 120, 130, 140 150, and 200, in Complainants' Exhibit "Box of Comparative Samples," and state whether you do not find the name of Thomas Russell appearing on each in the same place as upon the twelve spools of the Defendants' Exhibit "John

Clark, Jun'r, & Co.'s Mile-end, &c.," which you have just examined.

A. I do not.

71 X Q. On which ones do you not find Thomas Russell and on which ones do you find it?

Same objection.

A. I do not find it on 110, 120, 150; do find it on 130, 140, and 200 of our white goods on black spools.

72 X Q. You do not find "Thomas Russell & Co." upon either of the six spools from complainants' exhibit, do you?

Same objection.

A. No, sir.

73 X Q. As you picked up one of those six spools from complainants' exhibit the black and gold label came off, and you stuck it on again by wetting the label and pressing it on the spool, did you not?

Same objection.

A. Yes, sir.

74 X Q. And the black and gilt label was already off from No. 200 of those six spools, and you replaced that in the same manner, did you not?

Same objection.

A. I did not. I don't think it was 200 I stuck on. I replaced the labels on two of the six spools, but now could not name the exact number.

310 75 X Q. The labels are liable to get off in any make of spool thread, are they not.

Objected to as immaterial.

A. Sometimes they do, but not often—but not as a general thing.

Defendants' counsel requests the acting examiner to take sole charge and possession of the exhibit, which has been put in evidence, subject only to inspection in his presence by counsel or parties on either side, and then to file the same in court, together with and attached to the deposition of this witness. The exhibit that is referred to is the exhibit offered in evidence after the answer to cross-question 61 and is marked as follows: Defendants' Exhibit John Clark, Jun'r, & Co.'s Mile-end 110 Spool Cotton, 1 Dozen, Jan'y 10, 1888, T. H., sp. ex'r.

The examiner is further requested to mark upon the rim of each spool his initials, T. H.

76 X Q. Who made 200-yard six-cord up to and including 100 first?

A. That's a question I can't answer.

77 X Q. Who made six-cord up to and including No. 70 first?

A. Same answer.

78 X Q. Same question as to No. 50?

A. Same answer.

79 X Q. You spoke somewhere in your deposition of your thread being formerly known as John Clark, Junior. What did you mean by that? State a little more fully.

A. I would say that I mentioned it as being known as John Clark, Junior, & Co. on the black spools. At that time it was made on the other side and spooled in this country, known as the brand of John Clark, Junior, & Co. on the black spools.

311 80 X Q. Who knew it by that name of John Clark, Junior, & Co.?

Objected to as immaterial.

A. The trade using it and many customers buying it.

81 X Q. By what name is J. & P. Coats' cotton known by the same people?

A. As J. & P. Coats' cotton.

82 X Q. And the Willimantic by the name Willimantic. Is that so?

A. Yes, sir.

83 X Q. And Orr's & McNaught's was known by that name, was it?

A. When I was a boy it was. I don't hear anything of that now.

84 X Q. And George A. Clark's is known as Clark's O. N. T. or sometimes O. N. T., is it not?

A. Yes, sir.

85 X Q. Don't you think the 200-yard six-cord spools of black thread of the two Clarks look, as a whole, more like each other than the spools of white thread of the said two Clarks?

Objected to as immaterial.

A. There's similarity in them in appearance.

86 X Q. In which is the similarity greater, in the spools of white thread or the spools of black thread?

Same objection.

A. The black thread.

87 X Q. Have you noticed the raised number, indicating the size of the thread, on the wooden edge around the label of Coats' cotton?

A. I have.

88 X Q. Do you consider it a useful means of determining the number of the thread in the absence of the label by loss or its defacement?

A. I don't know that it is.

312 89 X Q. It will inform the user of the number of the thread in such cases, will it not?

A. No more so than the spool being properly numbered on both ends, as ours are. I mean the Mile-end by ours.

90 X Q. But in case it were not numbered on both ends, as yours is, and the label showing the number were lost off or defaced, then

the raised numbers would be useful to determine the size of the thread, would they not?

A. I presume it might, but it's quite unusual of later days that many tags naming the number are lost off either end of the spool, which I have previously stated.

91 X Q. The Coats people think it a very useful thing to have the number on the spools, do they not, so as to determine the size of the thread when the label is defaced or lost?

A. I never heard them say so. I've always understood it was their trade-mark.

92 X Q. But if they should say so you'd believe them, would you?

A. From my acquaintance with the gentlemen I should. My acquaintance is very limited with them in a personal way.

93 X Q. That raised number appears in four or five places on the spool, does it, and so arranged as to be rear right side up, at least once, whichever way the spool is held. Will you look and see if that is not so from the spools in Complainants' Exhibit "Box of Comparative Samples"?

A. The coarser numbers have five; No. 50 has four; No. 100 has four, but the goods shown me appear to be somewhat soiled—they look a little old. I can't say as to their later production how those numbers are.

94 X Q. In number 100 the label partly covers two of the raised numbers, does it not?

A. No, sir; a small part of one and a large part of the other.

313 95 X Q. A good many people have testified that those numbers are useful in determining the size of the thread, and that it is useful to have the raised number in more than one place, so as to conveniently see the number, whichever way you hold the spool. Do I understand you as not agreeing with that opinion or do you agree with it substantially?

A. I think the raised spool is a very good thing, but not absolutely necessary when the number is on both ends of the spool.

96 X Q. Why do your people have the number on both ends of the spool?

A. I know of no other reason only for the convenience of the trade. In case one falls off, which is rare, the merchant could turn the spool over and still have the correct number.

97 X Q. And the user the same—is not that so?

A. I presume it is.

Redirect by Mr. BETTS:

98 Re-D. Q. State whether the black spools of Clark's Mile-end thread on which white thread is wound are recognized as a distinctive feature in connection with their label and general appearance in the trade.

A. Yes, sir.

99 Re-D. Q. Is that thread called Clark's thread on black spools in your experience?

A. Very many times in former years; often now; but our goods are known generally throughout the country as Clark's Mile-end or Mile-end thread.

100 Re-D. Q. Are the words Mile-end used as a trade-mark by your concern?

A. Yes, sir.

101 Re-D. Q. Have you any personal knowledge beyond the understanding in the trade as to who are members of the combination, as you call it in your testimony?

A. Only in a general way, as the names of firms connected with it are. I have no special acquaintance with any member of it outside of our house.

314 102 Re-D. Q. At what price is Merrick's thread ordinarily sold by the spool?

A. Five cents a single spool. Often six for a quarter.

103 Re-D. Q. That is the same price as Clark's and Coats' sells for by the single spool, is it not?

A. By the single spool; yes, sir.

104 Re-D. Q. Please state what the high numbers of spool cotton, those above 100, are generally used for.

A. As a general thing, for the finer fabrics—for laces. I understood the finer numbers above 100 were mainly used on the other side for laces.

105 Re-D. Q. Do you know of your own knowledge the cost of manufacture of thread of a different number of cords?

A. I do not.

106 Re-D. Q. Then you don't know whether in fact six-cord costs more to make than three-cord?

A. Not to my own knowledge, but I naturally should suppose it might.

107 Re-D. Q. You have not examined the number of cords in the thread in the box marked "Defendants' Exhibit John Clark, Jun'r, & Co.'s Mile-end, No. 110, Spool Cotton, 1 Dozen, Jan'y 10, 1888," to ascertain of how many cord that thread in fact is, have you?

A. I did not examine the thread; only the spools.

108 Re-D. Q. When you say in answer to question 64 that the goods are not of more recent dye—please explain what you mean by that.

A. I mean that the box in question evidently is three or four years old, and that in the meantime we claim to have improved very greatly in all our colored threads, including black.

109 Re-D. Q. Have any spools in the market the raised numbers embossed on the wood of the spool around the label except Coats' and Merrick's, of which you know?

A. I have never seen any.

110 Re-D. Q. Is that embossing of the numbers a feature which marks the Coats spools and distinguishes it from others in your experience?

Objected to as leading.

315 A. It has in many instances.

111 Re-D. Q. State whether it has been recognized in the trade as a feature of the Coats spools.

Same objection.

A. I have heard it spoken of many times by the trade in that connection.

112 Re-D. Q. If numbers were printed around the rim of the spool instead of being raised or embossed, indicating the number of the thread, would not that serve the purpose of these embossed numbers so far as they indicate the numbers?

Same objection.

A. In my judgment they would.

Recross-examined by Mr. WITTER:

113 Re-X Q. Are you accustomed to determining by examination whether a thread of the higher numbers is six-cord or three-cord. If you are, or can do so, will examine the thread upon each spool in the Defendants' Exhibit Box and state whether it is six-cord or three-cord.

A. I am not accustomed to examining them, and were I could not determine the matter without a strong glass.

114 Re-X Q. I think you can be furnished with a glass here either now or to-morrow morning, and as I have had no difficulty in determining that it was three-cord without a glass, perhaps you can satisfy yourself on that point. Will you now do so with or without the magnifying glass which is now handed you?

Objected to, as the witness says that he is not accustomed to making such examination of thread and has not been called as an expert or qualified as such for such a purpose.

316 A. I will, but I never claimed it was more than three-cord.

Defendants' counsel desires the examiner to note that complainants' counsel has just used the language, "You may find it six."

Examiner so notes.

Complainants' counsel asks the examiner to put down what the witness said and his answer thereto.

Examiner says that he did not hear what witness said.

Complainants' counsel states that he, defendants' counsel, states in the question that he, defendants' counsel, found the thread to be three-cord; he, complainants' counsel, remarked as the witness was beginning his examination, after he made his last answer, "You may find the thread is six-cord or even seven-cord after all.'

The witness continues: I have just examined the thread on one spool, No. 110, black, from said exhibit box and find it to be three-cord. I have reason to believe that the remaining eleven are the same, three-cord.

The examiner is requested to mark the spool on the wooden rim with a cross.

The examiner so marks the spool.

LEROY B. COX.

Sworn to before me this 10th day of January, 1888.

THOMAS HUNT, *Sp. Ex'r.*

Examination adjourned to Wednesday, January 11th, at 10.30 a. m.

JANUARY 11TH, at 10.30 a. m.

Examination adjourned to new notice.

317 NEW YORK, *January 12th*, 1888—10.30 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Examination adjourned to a later hour, notice to be given by complainants' counsel.

2.15 P. M.

Met pursuant to notice as above.

Present: Counsel as before.

PIERRE V. ROOT, a witness called on behalf of complainants, after being duly sworn, deposes and says:

1 Q. What is your name, age, residence, and occupation?

A. Pierre V. Root; my age is 28 years; my residence is 228 South Hoyne street, Chicago, Illinois, and my office at No. 191 La Salle street, in the same city; my occupation is that of salesman for the Willimantic Thread Company.

2 Q. How far back does your experience go in relation to spool cotton; how long have you been with the Willimantic Thread Co., and what brand or makes of spool cotton have you come in contact with?

A. Two years. I have been with the Willimantic Thread Company two years. All of that time I have come in contact with Coats', Clark's O. N. T. and Clark's Mile-end, Kerr's, Merrick's, Chadwick, and the Willimantic, of course.

3 Q. What territory have you covered as salesman for the Willimantic Company?

A. The city of Chicago and a portion of the State of Illinois.

318 4 Q. In your experience and in your territory what has been the leading spool cotton in the market as to amount of sales?

A. Coats' thread.

5 Q. Of how many cord have you understood Coats' thread to be in the higher numbers, namely, those above 100? We are speaking in all this testimony of 200-yard spools—of what is known as best six-cord thread.

A. Three cord.

6 Q. State whether or not that has been the general understanding in the trade so far as your experience goes.

Objected to as immaterial.

A. It has.

7 Q. What class of dealers in spool cotton do you come in contact with as salesman for the Willimantic Company?

Same objection.

A. Principally dry goods and notions.

8 Q. Are they dealers who sell direct to the consumer in small quantities, if asked for?

A. They retail the thread direct to the consumer.

Same objection.

9 Q. State what make of spool cotton in your experience and opinion—in the appearance of its spools and labels—bears the closest resemblance to Coats' spool cotton.

Objected to as leading.

A. Merrick's.

10 Q. In your opinion is that resemblance so close as to be calculated to deceive customers who were not paying special attention to carefully examine the spools they purchased?

Same objection.

319 A. It is.

11 Q. Can you mention any instance in your experience where a purchaser was so deceived and obtained Merrick's instead of Coats'? And, if so, state that instance.

Same objection.

A. I can. I have one instance in my mind, that of Mrs. Partridge, of 228 South Hoyne street, Chicago. As well as I can recollect it was about a year ago. She inquired in a store for Willimantic thread and the dealer told her that he didn't carry it, so she asked for a spool of Coats'; he gave her a spool of Merrick's, which she didn't notice at the time, but afterwards discovered that it was another thread; that it was Merrick's thread.

Same objection and as hearsay.

12 Q. State whether she showed you this spool of Merrick's thread so given her for Coats'.

Same objections.

A. She did.

13 Q. Was anything else said in regard to the matter at the time she showed it to you?

Same objections.

A. I told her that I had heard of other or similar instances of where people had been deceived in the spool.

14 Q. In going around among the dealers as salesman for the Willimantic Company has the question of similarity between the Coats' and the Merrick's spools in appearance come up? And, if so, mention the name of any dealer and state the occurrence.

Same objections.

320 A. That question has come up on several occasions. There's one dealer that I call to mind, speaking of the similarity of the spools. His name was O. C. Fisher, 161 North avenue, Chicago. He was just speaking to me of people being deceived in the appearance of the spools and his being able to sell Merrick's for Coats'.

15 Q. What was his statement to you or the substance of it, as you remember?

Same objections.

A. He said he was going to try and sell Merrick's thread, as there was more money in it.

16 Q. And in regard to the similarity to Coats' what was his statement?

Same objections.

A. Said he thought he could sell it as well as Coats', because he didn't think people generally could tell it from Coats'. (Now I'm taking this all from memory.) You understand what I mean by that; I can't swear that that was the exact conversation, but as near as I can remember.

17 Q. And *the* in other instances what was the substance of what was said to you by the dealers as to similarity between Coats' and Merrick's?

Same objections.

A. Substance was about the same.

18 Q. State whether O. C. Fisher at the time of his making this statement to you had Merrick's thread in stock.

Same objections.

A. He had a few dozen in stock.

Testimony of this witness is here seasonably objected to as not in rebuttal, and it is further objected to as making a new *prima facia* case and as incompetent.

321 Complainants' counsel refers defendants' counsel to the orders of court under which this testimony is being taken and the decision of Hon. E. Henry Lacombe, circuit judge, in regard to the character of testimony which might be taken.

Cross-examined by Mr. WITTER:

19 X Q. When did the occurrence with O. C. Fisher happen?

A. As near as I can recollect, it was about a year ago.

20 X Q. What month was it?

A. I could not tell you.

21 X Q. Where was it?

A. In his store, in Chicago.

22 X Q. Was it winter or summer?

A. I won't be positive which, but I think it was in the fall of 1886.

23 X Q. And was it with him personally or with some clerk?

A. It was with him personally.

24 X Q. How long had you known him?

A. About a year.

25 X Q. What thread does he sell now?

A. Willimantic and Coats'.

25 X Q. How long has he been doing so?

A. I don't know how long he sold Coats'. He sold Willimantic about a year and a half.

27 X Q. At the same place of business?

A. Yes.

28 X Q. What is Mrs. Partridge's full name?

A. Mrs. Thomas W.

29 X Q. She appears to live at the same number, at the same place with you. How does that happen?

A. I'm boarding at the house.

30 X Q. Is she the mistress of the house?

A. She is.

31 X Q. At what store did she say the incident happened that you relate about her in answer to question 11?

322 A. I don't remember that she stated.

32 X Q. Have you no information about it?

A. None further than I've given.

33 X Q. Does the Partridge incident belong to about the same time as the Fisher—that is, the fall of 1886 or thereabouts?

A. It was about the same time, I think.

34 X Q. What was your occupation before you went with the Willimantic Co.?

A. I was shipping clerk in a jobbing house with Locke, Hulcatt & Co., in Chicago, No. 249 Munroe street.

35 X Q. How long were you in that employ and where were you before that?

A. I was with them two years, and before that was employed in New York city.

36 X Q. By whom and for how long?

A. By Brown & Seccomb, 68 Broad street; two years.

37 X Q. By whom and for how long next previous?

A. By the Quaker City Shirt Co., at 590 Broadway, for nearly three years.

38 X Q. And next previous to that?

A. I was with my father for awhile at 17 Broadway.

39 X Q. And where previous to that?

A. Nowhere previous to that.

40 X Q. About how long were you with your father at 17 Broadway?

A. About four or five months.

41 X Q. Does the Willimantic Co. make and sell a three-cord thread other than that portion of the six-cord thread which you think the trade understand to be three-cord?

A. I don't quite understand that question.

42 X Q. Does the Willimantic Co. make and sell a three-cord; and, if so, of what numbers?

A. They do. I think the numbers run from 8 to either 40 or 60.

43 X Q. How does the price of this compare with the six-cord price?

A. The price is less than the six-cord thread.

323 44 X Q. Do you mean less than the price of the six-cord thread?

A. Yes.

45 X Q. How much less for the same amount of thread?

A. I think it's 35 cents less.

46 X Q. Which costs the most to make of the same material, six or three cord?

Objected to as immaterial and incompetent and not called out by the direct.

A. I cannot answer that question; I'm not a thread expert.

47 X Q. What do you think?

Same objection.

A. I should think the three-cord would cost less.

48 X Q. If I understand you, the Partridge incident was related to you by the woman and that you were not present when it happened and can't give any idea who it was that gave the Merrick thread to her; is that so?

A. I don't know who it was that sold the Merrick thread to her, but she related the incident to me.

49 X Q. When did she relate the incident to you?

A. Shortly after she bought the thread.

50 X Q. How soon, as you understand it?

A. Probably a day or so after.

Redirect waived.

PIERRE V. ROOT.

Sworn to before me this 11th day of January, 1888.

THOMAS HUNT, *Sp. Ex'r.*

JANUARY 23D—2 p. m.

Examination adjourned to 3.30 p. m.

324 3.30 P. M.

WILLIAM F. WILLIS, a witness called on the part of the complainants and having been first duly sworn, testified as follows:

1 Q. What is your name, age, residence, and occupation?

A. William F. Willis; 41 years old; reside at 408 Pacific street, Brooklyn; I am notion buyer for Butler, Clapp, Wentz & Co.

2 Q. State in whose employ you are now, how far back your experience goes in relation to spool cotton, with what brands of cotton are you familiar, and with what firms have you been and in what capacity were you during the time of this experience. I refer throughout this testimony to 200-yard spools of what we know as six-cord spool cotton.

A. Butler, Clapp, Wentz & Co. My experience with such spool cotton goes back to 1872, and I have been familiar with Coats' principally; also with Clark's O. N. T. and Clark's Mile-end. I have been with the above firm all the time, but under different names. From 1872 to 1878 I was a department salesman; after that buyer. My firm has been during all that time located on Broadway, in New York city.

— Q. You did not mention the Willimantic.

A. I am familiar with that also; it is a comparatively new thread.

4 Q. Please look at the box of five dozens assorted colors of Merrick's spool cotton now shown you and state whether you obtained the same; if so, from where and when.

Objected to as immaterial and irrelevant.

A. That's the box we bought from the Merrick Thread Company. I think the date is January 12, 1888, and I produce a bill for the same. I marked the box with a private mark, by which I recognize it, and I then sold it to Auchincloss Brothers, for whom I
325 bought it. This box is now in the same condition and presents the same appearance as it did when I purchased it, and the arrangements of the spools is as it was when I received it.

Complainants' counsel here states that this box of Merrick's spools was sent to him by Auchinscloss Brothers, and that the spools were numbered in his presence from 1 to 60, running from left to right, from the top row downward in succession, in the same order they were when the box was received by him, and that the same fact is true in regard to the numbering of spools as to situation in the box containing five dozen J. & P. Coats' spools of colored cotton, which will be referred to later.

Complainants' counsel offers in evidence the five dozen boxes of Merrick's colored spools referred to above, and the same is marked Complainants' Exhibit "Five-Dozen Box Merrick's Colored Spools," January 23, 1888, T. H., sp. ex'r.

Also the bill for said box referred to by the witness, and the same is marked Complainants' Exhibit Merrick Colored Spool Bill, January 23, 1888, T. H., sp. ex'r.

Also a box containing five dozen J. & P. Coats' colored spools, and the same is marked Complainants' Exhibit Five-Dozen Box Coats' Colored Spools, January 23, 1888, T. H.

5 Q. Look at the Exhibit Five-Dozen Box Coats' Colored Spools, and referring especially to the end of the box where its cover is on, which contains the words "five dozen standard colors" and the three spool-head labels, state how long you have known of Coats'

colored six-cord cotton being put in boxes with ends presenting the same appearance with their cover on.

Objection to as immaterial and irrelevant.

326 A. Well, I'd answer during my buyership; ten years, I would say.

6 Q. State how boxes of five dozen colored cotton are set upon the shelves by dealers with reference to whether they are so set as to show the end containing the labels as on this Exhibit Coats' Box 2.

Same objections.

A. I can't answer that. I can only answer as to my own personal experience, as to how we set them. We stack them on the ledge all the way from ten to twenty boxes high.

7 Q. So as to show the end labels?

A. We always face the labels out.

8 Q. Please look at these two boxes, Complainants' Exhibit Five-Dozen Box Merrick's Colored Spools and Complainants' Exhibit Five-Dozen Box Coats' Colored Spools, as I now show them to you, with their covers on, one placed above the other at a short distance, and, looking at the end labels on each, state whether, in your opinion, there is a similarity in appearance between these boxes in that respect, and whether it is such as would be calculated to mislead a person not paying close attention.

Same objection.

A. My answer would be yes to that.

9 Q. I now call your attention to the colored spools in those two boxes and their arrangement. Please state whether you find a similarl-y of arrangement of colors in those boxes.

Same objection.

A. Yes; I should say there was.

10 Q. In your opinion, as those boxes lie side by side open and uncovered, is that similarity such that a person not paying close attention would be liable to mistake one brand for the other?

Same objections.

327 A. Well, I can only answer that in one way: that if that box laid on one ledge, as it is now (pointing to the Merrick's box), I should have picked it up for a box of Coats' cotton.

11 Q. In your experience, of how many cords have you understood Coats' thread is in 200-yard spools of their best spool cotton to be?

A. Six cord.

12 Q. How about the higher numbers—above 100—as to being six cord?

Same objection and leading.

A. Well, they are only three cord.

13 Q. Is this generally known in the trade in your experience?

Same objections.

A. I think it is.

14 Q. Which spool heads in appearance bears the closest resemblance to Coats', in your opinion, considering the whole appearance of the spool head? I mean the upper head.

Same objections.

A. Well, I think Merrick's comes the nearest to it.

Cross-examined by Mr. WITTER, he says:

15 X Q. Will you please look up and read to the examiner the rest of the bill here produced and marked "Complainants' Exhibit Merrick Colored Spool Bill"?

A. It couldn't be done; it must be thrown in the waste basket.

Further cross-examination adjourned to new notice, because notice of taking testimony in Chicago, Illinois, has been given and Mr. Witter, counsel for defendants, states that he is going there to attend the taking of such testimony and must leave New York to-
328 morrow morning, January 24th, to arrive in time, the notice having been given for January 25th.

NEW YORK, *Jan.* 28, 1888—11 a. m.

Met pursuant to notice.

Present: Samuel R. Betts, of counsel for complainant-.

Complainants' counsel shows to the special examiner an order of the Hon. E. Henry Lacombe staying the taking of testimony until Monday morning, January 30th, at 11 a. m., on account of the absence of defendants' counsel, Mr. Witter.

Examination is accordingly adjourned to Monday, January 30th, at 11 a. m.

NEW YORK, *January 30th*, 1888—11 a. m.

Met pursuant to adjournment.

Present: Samuel R. Betts, for complainants; William C. Witter, for defendants.

William F. Willis, the witness, appearing for further examination, Mr. Witter says that he has conferred with the president of the defendant company this morning for the first time since counsel's return from Chicago, and that he has no further cross-examination.

WM. F. WILLIS.

Subscribed and sworn to before me this 30th day of January, 1888.

THOMAS HUNT,
Special Examiner.

Examination adjourned to 11 a. m., January 31st, at complainants' request.

329 JANUARY 31, 1888.

JOSIAH N. HORNBLOWER, a witness called on behalf of complainants, after being duly sworn, says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?

A. My name is Josiah N. Hornblower; my age is 29 years; I reside at the Aberdeen hotel, Broadway and Twenty-first street, and I am a salesman for Auchincloss Brothers.

2 Q. State what your experience has been in connection with spool cotton.

A. I entered the business as shipping clerk of Auchincloss Bros. eight years ago and have been with them ever since in various capacities, and am now salesman in New York city.

3 Q. Please look at the box marked Complainants' Exhibit "5-Dozen Box Coats' Colored Spools" and state whether you recognize it and what it it is.

A. Yes, sir; I recognize that as a "W" assortment from 40 to 60 of J. & P. Coats' spool cotton. W is to distinguish the box from any other five-dozen assortment.

4 Q. To distinguish it as to what?

A. As to the season of the year in which the line of goods they are to fill—as for the fall trade or spring trade. I might add it is for customers to order by.

5 Q. Looking at Complainants' Exhibit "Five-Dozen Box of Coats' Colored Spools" and at the arrangement of the colored spools therein, please state how long you have known the colored spools in Coats' five-dozen boxes to be arranged in that exact order.

A. Since this first packing order was put in, May 21st, 1886, No. 1789.

The packing order produced by the witness is offered in evidence and marked Complainants' Exhibit "Coats' Packing Order," January 31, 1888, T. H., sp. ex'r.

330 6 Q. Referring to this Complainants' Exhibit "Coats' Packing Order," state what it is and how a box like Complainants' Exhibit "Five-Dozen Box of Coats' Colored Spools" is packed under it.

Objected to as incompetent, the witness not having been shown to be familiar with or acquainted with the methods of packing, marking, &c., pursued by complainants or their agents.

A. This is a packing ticket showing the arrangement of numbers and colors in the five-dozen box. Shall I describe what these numbers mean? (Complainants' counsel says go on and the witness continues:) The numbers in rows 1, 2, 3, 4, and 5 denote the number of the row which these colors are in, the numbers in red ink being the thread number, the number in black ink being the type number, and the words "royal blue," &c., indicate the color. In each number of the 1, 2, 3, &c., representing the rows beginning

with row No. 1, we have a set of "royal blue," type number 1369, thread numbers 40, 50, and 60, which denotes the three spools to go to that position and continued likewise through the rest of the box in rows numbers 2, 3, 4, and 5,

7 Q. State whether the box Complainants' Exhibit "Five-Dozen Boxes of Coats' Colored Spools" is packed in exact accordance with the packing tickets, Complainants' Exhibit "Coats' Packing Order."

A. Yes.

8 Q. Have you seen boxes of five dozen colored spools on the shelves of jobbers; and, if so, how are they arranged on the shelves ordinarily?

A. To show the colors the cover is removed from the box and placed under the bottom, and this uncovered box is placed on the top of other boxes which are similar and which have a wrapper around them.

9 Q. So that the specimen box Coats, for example, shows the
331 assortment of colors and also the end of the box containing the spool, labels, and words "five dozen standard colors;" is that it?

A. Yes.

10 Q. How long have you known Coats' five-dozen boxes of colored spools being put up with the end label and spool labels like those shown on Complainants' Exhibit "Five-Dozen Box of Coats' Colored Spools"?

A. Nine years; since I've been in the business.

Examination adjourned to Monday, February 6th, 1888, at 11 a. m.

NEW YORK, *February 6th*, 1888—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of examination of J. N. HORNBLOWER by Mr. BETTS:

11 Q. You speak in answer to question 5 of having known the colored spools in Coats' five-dozen boxes to be arranged in the exact order shown by Complainants' Exhibit "Coats' Packing Order," since May 21, 1886. State whether in that answer you referred to colors, the same as shown in that box, Complainants' Exhibit "Five-Dozen Box Coats' Colored Spools" and mentioned in Complainants' Exhibit "Coats' Packing Order."

A. I refer to the colors.

12 Q. The colors shown in that box, do you mean?

A. Yes.

13 Q. State when that assortment of colors was introduced by your firm in five-dozen assorted boxes?

A. I don't quite understand that.

The examiner reads the question again.

A. I can't answer the time when.

332 14 Q. State whether it was prior to the date of this packing ticket, Complainants' Exhibit "Coats' Packing Order."

A. Yes.

15 Q. Please look at the two spools I now hand you, one of black thread, bearing the label of the Merrick Thread Co., No. 140, and the other of white thread, bearing the label of the Merrick Tread Co., No. 150, and state if you have examined the thread on those two spools to ascertain how many cords it is.

A. I have and find them three cord.

Complainants' counsel offers in evidence the two spools referred to by witness, and the same are marked Complainants' Exhibit Merrick's No. 140 Three-Cord Spool and Complainants' Exhibit Merrick's No. 150 Three-Cord Spool respectively, February 6th, 1888, T. H., sp. ex'r.

The testimony of this witness on the subject of the 5-doz. ass. boxes put up or sold by complainants or defendants is here seasonably objected to as incompetent, as not in rebuttal, as tending to make a *prima facie* case, and as irrelevant to the issues of this controversy.

Cross-examined by Mr. WITTER:

16 X Q. Look at the two spools of thread marked respectively Complainants' Exhibit Merrick's No. 140 and No. 150 Three-Cord Thread, and state whether you find the words "best six-cord" or "six-cord" anywhere upon them.

A. I see nothing upon them to denote what the cord may be.

17 X Q. Look at them again and state whether you find the words "best spool cotton" upon either of them anywhere.

A. I do not.

18 X Q. State whether the box containing a dozen spools of

333 Merrick's thread like the exhibits or either of them bore the words "best six-cord" or "six-cord" upon the bottom of the box.

Objected to as immaterial and not called out by the direct.

A. I do not know.

19 X Q. Have you any evidence that those words were upon the bottom of any box containing such thread?

Same objections.

A. No; I haven't.

20 X Q. Have you any evidence that any box containing Merrick's thread, whether of a number higher or lower than 100, had a flap within the box bearing the words "best six-cord, 8 to 200"?

Same objections, and complainants' counsel states that the witness has been called solely to testify as to the number of cords in the thread of these two spools and has no knowledge as to their purchase, which will be proved by a subsequent witness.

A. I do not know.

21 X Q. Do you mean that you don't know whether you have any such evidence or that you don't know whether the Merrick boxes have any such flaps?

Same objections.

A. Both.

22 X Q. What do you mean by saying that you don't know whether you have any such evidence or not? Explain yourself fully.

Same objections.

A. Does that refer to me personally?

334 23 X Q. Yes. The question calls for your personal knowledge, acquired in your business as thread dealer or in any other way.

Same objections.

A. I have no personal evidence of either one. I have never noticed it at all.

25 X Q. Are you acquainted with the way in which the Coats' people put up their 200-yard six-cord thread?

Same objections.

A. I am.

26 X Q. Please look at the boxes of Coats' thread containing spools bearing 200 yards of six-cord thread, and in numbers 8 to 100, inclusive, and which were offered in evidence by complainants' counsel as a part of Exhibits Coats' Samples No. 1 to 67, and state whether each one of these boxes does not contain a flap bearing the words "best six-cord spool cotton, white and black, 8 to 200."

Objected to as immaterial and not called out by the direct examination in any way, and defendants' counsel is asked to point out any portion of the direct examination to which he claims this question is proper cross-examination.

Defendants' counsel thinks it is proper cross-examination for the purpose of showing the degree of witness' familiarity with the complainants' modes of putting up their 200-yard six-cord thread as bearing upon the competency of the witness to speak with reference to the packing of other colors of that thread than white and black, and for other reasons which he will be ready to give if the propriety of the questions should ever come before the court.

Complainants' counsel states that the direct examination
335 was strictly limited to Coats' five-dozen boxes of assorted colored spools and renews his objection.

A. Where are they?

Defendants' counsel calls upon complainants' counsel to produce his Exhibits Coats' Samples from Nos. 1 to 67, so far as they were boxes of the 200-yard six-cord thread from Nos. 8 to 100, inclusive.

Complainants' counsel states that he does not find any exhibits

marked Exhibits Coats' Samples 1 to 67, but is perfectly willing to produce such exhibits if they can be found or were ever marked, and asks defendants' counsel if he claims that there were ever any such exhibits so marked in the case.

Defendants' counsel claims that such exhibits were produced and offered in evidence by complainants' counsel and testified about in the deposition of complainants' witness, Henry B. Auchincloss. As to whether they were in fact marked or not defendants' counsel refers to the record of complainants upon the direct examination of said Auchincloss following the answer to the 12th question, page 71, Complainants' Printed Record, and defendants' counsel presumes they were marked as there stated. They certainly ought to have been.

27 X Q. Look at "Coats' six-cord samples No. 14, T. H., sp. ex.," and state whether the flap of that box bears the words "best six-cord spool cotton, white and black, 8 to 200."

Same objections, and complainants' counsel asks defendants' counsel if the above Exhibit No. 14 produced by complainants' counsel is one of those called for.

Defendants' counsel says that at this moment he cannot say.

336 A. It does.

18 X Q. Do the dozen boxes of six-cord 200-yard thread put up by complainants at the present time contain exactly that language upon the flap of the boxes of Nos. 8 to 100, or has there recently been a change in the printing of those flaps so that they now read "best six-cord spool cotton, white and black, 8 to 100," instead of "8 to 200," as appears upon the flap of the dozen box No. 60 white of such thread now handed to you, put in evidence by defendants' counsel and marked "Defendants' Exhibit No. 59, Coats' recent box and flap, Feb'y 6, 1888, T. H., sp. ex."?

Same objections.

A. This flap reads "white and black, 8 to 100."

Upon the question being re-read the witness continues:

This recent box reads 8 to 100—white and black, 8 to 100.

29 X Q. And do the boxes of such thread now being sold to the public by complainants or Auchincloss Brothers, their agents, say upon the flap of the boxes of Nos. 8 to 100 "best six-cord, white and black, 8 to 100," instead of "8 to 200"?

A. I have not read a flap for some time. I couldn't answer.

30 X Q. At the adjournment for lunch will you examine at complainants' agency a sufficient number of boxes of the kind referred to and of recent make and be prepared to answer the question?

Same objection, and complainants' counsel instructs the witness that he need not do this, this cross-examination being entirely outside of the direct examination and an effort to use the witness as defendants' own witness.

A. No.

337 31 X Q. Will you also look and see if complainants haven't taken the words best six-cord recently from the bottom label of boxes containing thread of Nos. 110 to 200, inclusive?

Same objections and instructions to witness, and complainants' counsel calls the attention of the court to the fact that the defendants have twenty days' time hereafter in which to put in any proofs that may be proper for the defense.

A. No.

32 X Q. Can you tell when the language on the top of the boxes of complainants' 110 six-cord thread was changed from "best six-cord" to "best spool cotton" or "best sewing cotton"?

Same objections.

A. I cannot.

33 X Q. Suppose a retailer sells Coats' or the two Clarks' or the Willimantic six-cord 200-yard thread at less than five cents a spool, what, under the requirements of those four companies making up the combination, will happen to that retailer?

Same objections, and witness is asked to decline to answer under instructions of counsel.

A. Under instructions of counsel I refuse to answer.

34 X Q. Isn't it a fact that the requirements of the combination are that no member of the combination shall sell that retailer any thread?

Same objections and instructions unless the witness answer I don't know. You can say, I don't know if such be the fact.

A. I don't know.

338 35 X Q. Please reflect and state whether it is not a fact that if the retailer sell Coats' or the two Clarks' or the Willimantic six-cord 200-yard thread at less than five cents a spool that under the requirements of those four companies making up the combination no member of the combination shall sell that retailer any thread.

Same objections and instructions.

A. Upon instructions of counsel I refuse to answer.

36 X Q. Are not the boxes of five dozen assorted spools of Coats' thread, such as you have testified to, and marked Complainants' Exhibit Five-Dozen Box Coats' Colored Spools, contained in a paper wrapper of some kind?

A. Yes, sir; as I have testified to before. I will describe that if you want me to. This wrapper leaves the ends of the box exposed to view. It is merely to take the place of a string to keep the cover on the box.

37 X Q. Will you produce the wrapper that belongs to the box that was put in evidence and marked as stated in the last question?

A. I will, or get one like it.

38 X Q. It is an open-ended paper wrapper, is it not?

A. Please describe what an open-ended wrapper is.

39 X Q. Is the Coats' wrapper for these boxes of thread a strip of paper with two ends pasted together and open at two ends, so that the box of thread may be slipped in and out of it?

A. It is a slip of paper with the ends pasted together and open at the sides, corresponding to the ends of the two boxes, so that the box may be slipped out of it, but it is pulled so tight so that you can't get it back again.

Adjourned for recess to 2 p. m.

339 3 P. M.

Continuation of the cross-examination of Mr. HORNBLOWER:

Witness produces a wrapper.

40 X Q. The wrapper which you produced when put upon the five-dozen assorted boxes of Coats' thread is pasted together, is it?

A. Yes; and drawn tight so as to keep the cover on the box and prevent the thread from spilling out.

Defendants' counsel puts the said envelope wrapper in evidence, and it is marked Defendants' Exhibit No. 60, Coats' Wrapper for Five-Dozen Assorted Box, February 6, 1888, T. H., sp. ex'r.

41 X Q. The Merrick boxes of five dozens standard colors do not have any such wrapper upon them, do they?

A. I do not know.

42 X Q. Complainants' Exhibit "Five-Dozen Box of Merrick's Colored Spools" did not have any wrapper upon it so far as you know, did it?

A. This particular box, no.

43 X Q. And you never knew of any other of their boxes having it, did you?

A. The same answer to the same question up above.

44 X Q. Do the Merrick boxes of five dozen assorted colors have any wrapper upon them, so far as you know?

A. No.

45 X Q. The said Merrick boxes are tied with a cord such as I now show you, are they not, instead of having a wrapper upon them?

A. I do not know.

Defendants' counsel puts the said cord in evidence, and it
340 is marked "Defendants' Exhibit No. 61, Tie-Cord for Five-Dozen Box for Merrick's Colored Spools, February 6, 1888, T. H., sp. ex."

46 X Q. Have you been to complainants' store since the adjournment?

A. Yes.

47 X Q. Did you look to see whether the changes have been recently made to which your attention was called just previous to

the adjournment—that is, the change in the printing on the flaps and on the one-dozen boxes of Coats' 200-yard six-cord thread?

Objected to as immaterial.

A. No.

48 X Q. What are the three black and gold labels on the cover of the Coats' box of five dozen standard colors put there for?

A. To designate the thread number or numbers contained in the five-dozen box.

49 X Q. Is that all?

A. In my opinion, yes.

50 X Q. What are the numbers which you refer to? State them.

A. 40, 50, and 60.

51 X Q. What does the "W" on these boxes indicate?

A. To enable customers to order by and to fill orders by.

52 X Q. And is it used for that purpose?

A. Yes.

53 X Q. Do you regard colors of the thread contained in that box as the most acceptable assortment of colors for five-dozen quantity?

A. For the period of when these colors were fashionable, yes.

54 X Q. And is that true of the present time, as you understand it?

A. I don't know.

341 55 X Q. What I mean is do you consider the assortment of colors in that box as at the present time a desirable assortment of colors or don't you so consider it?

Objected to as immaterial.

A. For the spring trade it is not a desirable box.

56 X Q. For what trade is it a desirable box?

Same objections.

A. For the season in the year at which dress goods of these shades are sold.

57 X Q. What season is that?

Same objections.

A. That depends upon the prevailing fashion and the wants of the customers.

58 X Q. When have the Coats people sold it as a desirable assortment?

Same objection.

A. Whenever they have an order for it.

59 X Q. And when do they have orders for it?

Same objection.

A. Almost every week.

60 X Q. Through the year?

Same objection.

A. Through the busy seasons.

61 X Q. When is the busy season?

A. At the time that the jobbing houses throughout the country are busy, commonly known in the dry-goods business as the fall and spring trade.

342 62 X Q. When did your concern first sell boxes of thread like the exhibit? State the earliest you knew of personally and state how you know it. I refer to Complainants' Exhibit "Five-Dozen Box of Coats' Colored Spools."

Complainants' counsel objects to the above question as indefinite, as it does not state whether the outside appearance of the boxes is referred to or the interior arrangement and colors of the thread or both.

A. Say a month or six weeks later than the date of the packing ticket, Complainants' Exhibit "Coats' Packing Order."

63 X Q. How do you know this?

Same objection, and counsel is requested to state whether he refers to the outside box or to the box containing the colors and arrangement shown in the exhibit.

Complainants' counsel states: The examiner is requested to note that the defendants' counsel refuses to indicate what he means by the above question.

A. By looking at "Complainants' Exhibit Coats' Packing Order," dated New York, May 21, 1886.

64 X Q. What is there upon that exhibit which you rely upon for your statement that five-dozen standard color boxes like "Complainants' Exhibit Five-Dozen Box of Coats' Colored Spools" were first sold by your concern, "say, a month or six weeks later than the date of the packing ticket"?

A. The line that read New York, May 21, 1886, or the date of the packing ticket.

65 X Q. Are you the son of Sarah E. Hornblower, who has been examined as a witness in the case for complainants?

A. I am.

343 Redirect by Mr. BETTS:

66 Re-D. Q. You never saw the box from which the two spools, "Merrick's No. 140 and No. 150 three-cord thread," came, did you?

A. I never did.

67 Re-D. Q. Do J. & P. Coats sell in this country thread other than white and black in numbers above 100?

A. They do not sell colored thread above 100.

68 Re-D. Q. What do the words "white and black, 8 to 200," on the label of Exhibit Coats' Six-Cord Samples No. 14 indicate to you?

A. Indicate that Messrs. J. & P. Coats manufacture spool cotton in white and black from number 8 to 200, and is understood in the trade as such.

69 Re-D. Q. What do the words "brown and assorted colors No. 8 to 100" in said flap or label indicate?

A. It indicates that brown and assorted colors, one dozen in a box, are made in numbers from 8 to 100 only, the staple shades, such as slate, blue, drab, and green, &c., being made 30 to 80; "fancy shades," such — light drab, pink, and bronze, &c., being 40 to 60.

70 Re-D. Q. When you speak of your concern as first selling thread like "Complainants' Exhibit Five-Dozen Box of Coats' Colored Spools," in answer to questions 62, 63, and 64, do you mean like that exhibit in regard to the color and arrangement of the spools inside the box, as well as the exterior appearance of the box?

A. Both. I might add that the exterior appearance of the box has appeared like that for a number of years. I want to be accurate about these things.

71 Re-D. Q. You mean a number of years prior to May 21st, 1886, the date of the exhibit the "packing order"?

A. I do.

Recross-examination by Mr. WITTER:

72 Re-X Q. In answer to the Re-D. Q. 69 you say that the
344 words "brown and assorted colors No. 8 to 100" on the flap of the box, marked "Exhibit Coats' Six-Cord Samples No. 14," indicates "that brown and assorted colors, one dozen in a box, are made in numbers from 8 to 100 only." Similarly do the words "white and black, 8 to 100," upon the flap of Defendants' "Exhibit No. 59," &c., indicate that white and black colors, one dozen in a box, are made in numbers from 8 to 100 only?

A. I object to the word "only" in answer to the question.

73 Re-X Q. Please answer the question, if you can.

A. Not similarly.

74 Re-X Q. How, then, if not similarly?

A. Well, you have to read that again; the question is not comprehensive to me.

75 Re-X Q. (Question repeated.)

A. Not necessarily.

76 Re-X Q. Well, how otherwise? Explain it fully.

A. Explain the object of the wording on the flap.

77 Re-X Q. (Question 72 repeated.)

Objected to as answered in answer to question 75.

Defendants' counsel requests complainants' counsel not to instruct the witness in his perplexities and straights, but to let him escape from his dilemma if he can unaided, after which defendants' counsel has no objection to complainants' counsel answering the question himself.

The court is referred by complainants' counsel to question and answer 75.

A. Not necessarily.

78 Re-X Q. As "8 to 100" associated with the words "brown and assorted" upon the one flap mean, as you say, that "brown and as-

sorted" colors are made only in the numbers 8 to 100, why do not "8 to 100," when associated with the words white and black, as they are upon the flap upon the Defendants' Exhibit No. 59, &c., in like manner mean that white and black are made in numbers 8 to 100 only?

345

A. I don't say only. I did not say only. Only was said for me.

79 Re-X Q. Are any other numbers than 8 to 100 made in brown and assorted colors in this country?

A. Not to my knowledge.

80 Re-X Q. Then the words "brown and assorted colors, 8 to 100," mean, do they not, that 8 to 100 and no others are made in brown and assorted colors; is not that so?

A. I don't understand that. Can't that be put in simpler form?

81 Re-X Q. In what numbers do you make the fancy shades as appears on the flap of Exhibit "Six-Cord Samples No. 14"?

Objected to as immaterial, and complainants' counsel gives notice that he will move to strike out all this recross-examination on the ground stated in objecting to this line of examination on the cross-examination of this witness, namely, that it is not in any way called out by the direct examination.

A. On the flap of Exhibit "Six-Cord Samples No. 14" the fancy shades are advertised for sale from 40 to 60.

82 Re-X Q. And in no other numbers; is that so?

Complainants' counsel here states that he has allowed this cross-examination, which goes into matters completely outside the direct examination, to proceed as far as it can possibly be necessary to prove the witness'*es* familiarity with the methods of putting up Coats' cotton; that defendants' counsel has been seeking to drag in outside matters not referred to on the direct; that complainants' time to take testimony is limited by order of the court to this week, and the cross-examination seems an effort to use up time, though complainant- has other witnesses to examine. Complainants' counsel therefore informs defendants' counsel that he will have to apply to the court if he desires to obtain further answers to this line of examination, but allows the witness to answer the above question.

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Defendants' counsel states that he has cross-examined this witness only during the absence of any other witness; that no other witness is now at hand or waiting to be examined, nor has there been; that he has heretofore stated to complainants' counsel that he would close this witness' cross-examination if he had another witness ready or desired to proceed with another; that the witness' deposition has already been once suspended to-day to permit the deposition of another witness to be taken; that defendants' counsel is ready to close the cross-examination at this moment if complainants' counsel has another witness to proceed with, and states that it is now twenty minutes past 5 o'clock in the afternoon, and that the suggestion of complainants' counsel that defendants' counsel is seeking to use up

time is highly incorrect, defendants' counsel having held himself ready at any and all times to attend the taking of testimony.

A. It is not advertised as so on the flap.

83 Re-X Q. How do you mean?

Same objections and statement.

A. As advertised, from 40 to 60 on the flap, in fancy shades.

84 Re-X Q. And that means that you make and sell those numbers, 40, 50, and 60, in fancy shades, does it not?

Same objections and statement.

A. It means that we advertise for sale fancy shades from 40 to 60.

347 85 Re-X Q. And it impliedly advertises that you have no other numbers than 40, 50, and 60 in fancy shades, doesn't it?

Same objections and statement.

A. I don't know what it implies. Should we have orders for fancy shades in other numbers other than 40 to 60 we would fill them.

86 Re-X Q. And you keep them on hand, do you—that is, fancy shades in other numbers than 40, 50, and 60, do you?

Same objections and statement.

A. Not necessarily keep them on hand. We can keep them or cannot, just as we please.

87 Re-X Q. Have you answered the questions throughout this examination as clearly and frankly as you have been able to?

Same objections and statement.

A. Yes.

JOSIAH N. HORNBLOWER.

Subscribed and sworn to before me this 6th day of February, 1888.

THOMAS HUNT,
Special Examiner.

Examination adjourned to Tuesday, February 7, 1888, at 11 a. m.

348 FEBRUARY 6TH, 1888—2 p. m.

JONATHAN H. LYMAN, being called on behalf of the complainants, after being duly sworn, says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?

A. My name is Jonathan H. Lyman; between 35 and 36 years old; I reside at 23 Emory street, Jersey City heights, and I am by occupation a buyer in the notions department of Lord & Taylor's, Broadway, New York city.

2 Q. State what the notion department at Lord & Taylor's covers; whether spool cotton is included in it.

A. It does include it.

3 Q. State how long you have been at Lord & Taylor's, where you were previous to going there, and how far back your experience in regard to buying and selling spool cotton dates.

A. I have been at Lord & Taylor's seven years as a buyer and in charge of that department. I was in the Bee Hive in Hartford, Conn., for three years. My experience dates back for fifteen years. Before going to Hartford I was at Kensington, Conn., for two years, and at New Preston, Conn., for two years before that; that was my first.

4 Q. Referring to Coats' spool cotton—I mean the 200-yard spools of the grade known as six-cord cotton—of how many cord have you understood the highest numbers, those above 100, to be?

A. Three-cord.

5 Q. In your experience in the retail trade in spool cotton has this been the general understanding in the trade, so far as you know?

Objected to as leading and incompetent.

A. I have known that.

349 Cross-examined by Mr. WITTER:

6 X Q. What 200-yard six-cord thread do Lord & Taylor principally sell?

A. O. N. T., Mile-end, and Coats'.

7 X Q. Do you mean Clark's O. N. T.?

A. Yes, sir.

8 X Q. And Clark's Mile-end?

A. Yes, sir.

9 X Q. How much a spool do Lord & Taylor sell these three threads for?

A. Five cents.

10 X Q. How much of your time is occupied by your duties as buyer for Lord & Taylor?

A. I should say one-half.

11 X Q. Do you personally sell spool thread at retail now?

A. Sometimes.

12 X Q. For Lord & Taylor?

A. Yes, sir.

JONATHAN H. LYMAN.

Subscribed and sworn to before me this 6th day of February, 1888.

THOMAS HUNT,
Special Examiner.

NEW YORK, *February 7th*, 1888—11 a. m.

Met pursuant to adjournment.

Present: Samuel R. Betts, for complainants; William C. Witter, for defendants.

Examination adjourned to Wednesday, February 8th, 1888, at 11 a. m., at request of complainants' counsel.

350 NEW YORK, *February 8th*, 1888—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Examination adjourned to 12.50 p. m., the witness who agreed to be present at 11 o'clock having failed to come.

12.50 P. M.

WALTER MILLER, a witness recalled in behalf of complainants and having been duly sworn, says:

Examined by Mr. BETTS:

1 Q. Please state whether, at request of complainants' counsel, you have purchased any spools of 200 yards Merrick thread since last you were examined here as a witness.

A. Yes, sir.

2 Q. Please produce the spools you have purchased.

A. I do so. Two of them are the spools which are marked in evidence Complainants' Exhibit Merrick's No. 140 Three-Cord Spool and Complainants' Exhibit Merrick's No. 150 Three-Cord Spool. I also produce four spools of Merrick's 200 yards black thread, No. 140, and four spools of Merrick's 200 yards white thread, No. 150.

Complainants' counsel offers in evidence the four spools of black thread, No. 140, referred to in the above answer, and the same are marked Complainants' Exhibit No. 140 Three-Cord A, B, C, and D respectively, February 8th, 1888, J. H., sp. ex.

Also the four spools of white Merrick thread, No. 150, referred to in the above answer, and the same are marked Complainants' Exhibit Merrick's No. 150 Three-Cord A, B, C, and D respectively, February 8, 1888, T. H., sp. ex.

351 3 Q. State where and when you bought these spools you have produced and from whom.

A. The first lines I bought February 3, the other eight February 8, 1888, at Mrs. Barr's, 308 Grove street, Jersey City.

4 Q. What did you pay for these spools apiece?

A. Five cents apiece.

5 Q. Who sold them to you?

A. The first two, which I bought February 3d, a saleslady in Mrs. Barr's store. The other eight that I bought to-day Mrs. Barr sold me herself. I got a bill for them—for eight spools—40 cents, which I now produce.

Bill produced by the witness is now offered in evidence and marked Complainants' Exhibit Barr Bill, February 8, 1888, T. H., sp. ex'r.

6 Q. What did you ask for when you bought these eight spools on February 8, and also the two spools on February 3d?

A. I asked her whether she had any Merrick's six-cord thread in numbers over 100.

7 Q. And what did the person who sold you the spools do or say in answer to your inquiry?

A. She opened the drawer of a Merrick cabinet and said that she had numbers 140 black and 150 white. That was the purchase on February 3d.

8 Q. And what was then said or done on February 3d purchase?

A. I told her to let me have a spool of 140 black and 150 white and paid her ten cents for them.

9 Q. Did you ask her the price before paying?

A. Not that purchase. I did to-day's purchase, and she told me she sold them five cents apiece.

10 Q. State whether you have examined these two spools you bought on February 3 and also the eight you bought on February 8th to ascertain of how many cord the thread on each of these spools is.

A. I did, and found them to be three cord on each spool.

352 Cross-examined by Mr. WITTER:

11 X Q. Do you find "best six-cord" anywhere on those spools, Complainants' Exhibits Merrick's No. 140 Three-Cord A, B, C, and D or Complainants' Exhibit Merrick's No. 150 Three-Cord A, B, C, and D?

A. No, sir.

12 X Q. How did you happen to go to this obscure corner of the world to find these spools?

A. I went to leave Mrs. Barr some O. N. T. advertising matter.

13 X Q. And you were really not on the hunt for these spools at all? Is that so? State frankly.

A. I was on the hunt for them.

14 X Q. How does it happen that you, an agent for the Clark O. N. T. people, interest yourself so deeply in the interest of complainants?

A. I was ordered to interest myself by a member of our firm.

15 X Q. Of what firm do you mean?

A. George A. Clark & Brother.

16 X Q. What was his name?

A. Mr. Robert B. Symington.

17 X Q. Who are the other members of the firm?

Objected to as immaterial and not allowed by the direct, and witness is instructed not to answer.

Question withdrawn by defendants' counsel.

18 X Q. Have you ever seen Henry Cumming with the idea or for the purpose of seeing whether he agreed with you in your testimony as to what he said about selling Merrick's thread for Coats'?

Objected to as immaterial and not called out by the direct, and witness is instructed he need not answer.

353 A. I refuse to answer under instruction of counsel.

WALTER MILLER.

Subscribed and sworn to before me this 8th day of February, 1888.

THOMAS HUNT,
Special Examiner.

Examination adjourned to Thursday, February 9th, 1888, at 11 a. m.

NEW YORK, *February 9th*, 1888—11 a. m.

Met pursuant to adjournment.
Present: Counsel as before.

The examiner states that he has now in his possession the exhibits introduced in evidence in this suit, with the exception of the following exhibits, which he cannot find after having made a careful search for them:

Complainants' Exhibit "Defendants' Bill."
" Exhibit Specimens Defendants' 6-Cord Thread 1, 2, 3, 4."
" Exhibit Specimens Defendants' 3-Cord Thread 1, 2, 3, 4, and 5."
" Exhibit Coats' Samples Nos. 1 to 67."
"Coats' 3-Cord Samples Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 15."
"Merrick's First Long-Length Spool Head."

Complainants' counsel states that he reserves the right to supply the place of these missing exhibits with others identical with them.

Examination adjourned to new notice.

354 NEW YORK, *January* 31, 1888—11 a. m.

Met pursuant to adjournment.
Present: Samuel R. Betts, for complainants; William C. Witter, for defendants.

P. JOSEPH O'KEEFE, a witness called on behalf of complainants, after being duly sworn, deposes and says:

Examined by Mr. BETTS:

1 Q. What is your name, age, residence, and occupation?

A. P. Joseph O'Keefe; 29 years last October; I reside, Brockton, Mass.; I am in the millinery business at Brockton: I have two kinds of business; I am in the millinery business in Brockton and am in the employ of Houghton & Dutton, of Boston, dry goods merchants.

2 Q. Are you the P. Joseph O'Keefe who testified in this suit on July 23d, 1885?

A. I am.

3 Q. Have you this day read the testimony you gave herein on July 23, 1885?

A. I have.

4 Q. Please read also questions and answers 17, 18, 19, 20, 21, 22, 23, and 24 of the testimony given by William G. Pierce on the part of the defendants herein on June 23d, 1887.

A. I have done so.

5 Q. I refer you particularly to question and answers 21, 22, 23 of Pierce's testimony, and as far as those answers relate to you and Mr. Pierce please state whether they are true or false.

A. They are false.

6 Q. State whether or not, in view of the testimony of Mr. Pierce that you have read from questions 16 to 24, you desire to make any changes in the testimony given by you herein on July 23,
355 1885, referring especially to answers to questions 30 and 31 of your testimony.

A. No, sir; I do not.

7 Q. Do you know the reputation of William G. Pierce, of Boston, Mass., for truth and veracity?

A. I do.

8 Q. What is it?

A. Not reliable.

9 Q. Would you believe him under oath?

Objected to as immaterial.

A. I don't think I would.

10 Q. Have you a distinct recollection of the occurrences set forth in answers 30 and 31 of your testimony given July 23d, 1885, as to statements made by Mr. Pierce in regard to similarity of Coats and Merrick?

A. I have.

Cross-examined by Mr. WITTER:

11 X Q. How long have you been in the millinery business in Brockton?

A. Since a year ago last September.

12 X Q. What and where was your business just previous to a year ago last September?

A. I was in the employ of Houghton & Dutton, of Boston.

13 X Q. How long had you then been in the employ of Houghton & Dutton?

A. I think about six months.

14 X Q. When did you enter the employ of Houghton & Dutton?

A. In April, 9th of April, of that same year—1886.

15 X Q. What had been your business previous to your entering the employ of Houghton & Dutton in 1886?

A. I was formerly with Shepherd, Norwell & Co., Winter street, Boston.

17 X Q. From what time to what time were you in their employ at Winter street?

356 A. I should judge somewhere in the neighborhood of about a year.

17 X Q. This is from about April, 1885, to about April, 1886; is that what you mean?

A. No; I mean that I was in the employ of Shepherd, Norwell — about a year altogether.

18 X Q. When?

A. Give me the date of that——

Defendants' counsel notes on the record that the witness in using the above language points to printed copy of complainants' testimony in the hands of complainants' counsel, and seeks to take it, and he is requested by defendants' counsel to answer the question put to him without referring to his previous testimony or to complainants' record.

A. During the year and a half previous to my entering the employ of Houghton & Dutton.

19 X Q. Did you go from the employ of Shepherd, Norwell & Co. to that of Houghton & Dutton directly; if not, what did you do between the two employments?

A. I went to Houghton & Dutton's from Shepherd, Norwell & Co.'s within two weeks.

20 X Q. What did you do in that two weeks in the way of business, if anything?

A. Nothing in the way of business.

21 X Q. How long had you been in the employ of Shepherd, Norwell & Co. continuously when you left them previous to the two weeks referred to?

A. Say four or five months.

22 X Q. Where were you employed immediately previous to the beginning of that four or five months?

A. Shepard & Co., at Providence; Westminster street.

23 X Q. How long were you at that time continuously in the employ of Shepard & Co.?

A. Less than three months.

357 24 X Q. Now state what employment you were in immediately previous to your employment at Shepard & Co.'s.

A. With Shepard, Norwell & Co., Boston.

25 X Q. For how long continuously?

A. I don't exactly remember.

26 X Q. State as nearly as you can.

A. I should say about seven months.

27 X Q. Is that the first time you had been in the employ of Shepard, Norwell & Co.?

A. Yes, sir.

28 X Q. Previous to this, your first employment by Shepard, Norwell & Co., in what employment were you?

A. In business for myself.

29 X Q. Where and under what name?

A. As O'Keefe Brothers, in Main street first and Front street afterwards, in Worcester.

30 X Q. Give the numbers of those two streets where your store was located.

A. No. 20 Front street. I think it was 546 Main; I'm not positive.

31 X Q. How long were you in business under the name of O'Keefe Brothers at these two places together?

A. Between five and six months.

32 X Q. Did that firm ever do business at any other place? If so, state where.

A. At 46 Front street.

33 X Q. When was that?

A. About a year and a half previous to going to Main street?

34 X Q. How long was business done under that name at that time?

A. During our entire stay at 46 Front street.

35 X Q. How long was that?

A. About a year and a half, as near as I can recollect.

36 X Q. What was your business immediately preceding that year and a half as O'Keefe Brotherss?

A. I was in the employ of J. Godinski & Co., at Main street, Worcester, for about two years.

358 37 X Q. Where immediately preceding that employment were you occupied and at what?

A. With Dunham & McKay, at Main street, Worcester, for about five years.

38 X Q. Did you do business as O'Keefe Brothers on any other occasions except the two you have just mentioned? If so, state where and when.

A. No, sir.

39 X Q. Where and when was your occupation immediately preceding Dunham & McKay?

A. With Harrington & Nichols, of Grafton.

40 X Q. For how long?

A. For two years.

41 X Q. Where and for whom were you employed previous to your employment with Harrington & Nichols and for how long?

A. I worked for my father from the time I was born up to that date, except the time when I was at school.

42 X Q. I will now repeat the names of the firms with whom you say you have been employed, the places where you were employed, and the time, and will ask if you find them to be correctly stated; and, if not, to make any correction you desire to make. I will give them in the reverse order to that in which you have mentioned them:

1. Your father, up to the time you went with Harrington & Nicholls.

2. Harrington & Nicholls, at Grafton, for two years.

3. Dunham & McKay, Main street, for about five years.

4. J. Godinski & Co., Main street, Worcester, for about two years.

5. O'Keefe Brothers, at 46 Front street, for about a year and a half.

6. O'Keefe Brothers, No. 20 Front street and, probably, 546 Main street, between five and six months.

7. Shepard, Norwell & Co., Boston, about seven months.

8. Shepard & Co., Westminster street, Providence, less than three months.

9. Shepard, Norwell & Co., four or five months.

359 10. About two weeks out of employment.

11. Houghton & Dutton; six months, about.

12. Millinery business at Brockton since a year ago last September up to the present time.

A. I was with Houghton — Dutton about six months previous to my going into the millinery business, and continued with Houghton & Dutton up to May, 1887.

43 X Q. With the exception you have just mentioned did you have more than one business or were in more than one employment at any time?

A. No, sir.

44 X Q. What happened to your business of O'Keefe Brothers the first time that you stopped? Tell us frankly.

Objected to as immaterial.

A. We sold out.

45 X Q. To whom?

Same objection.

A. Horace Kendall, of Worcester.

46 X Q. What happened the second time?

Same objection.

A. We closed out the business.

47 X Q. Didn't you fail in business?

Objected to as immaterial.

A. No, sir.

48 X Q. Weren't you in debt when you closed out?

Same objection.

A. I object to answering the question.

49 X Q. Don't you owe William S. Pierce to-day—the man you have been talking about—you or your then firm?

A. I don't think so.

360 50 X Q. Will you swear that you don't?

A. Yes; I'll swear that I don't.

51 X Q. You say you closed out. What do you mean by that?

A. Sold out.

52 X Q. To whom?

A. To different parties—sold out to different parties.

53 X Q. In what manner?

A. By advertising the stock and selling it out.

54 X Q. By selling it out in what manner?

A. Over the counter, as near as my recollection serves me.

55 X Q. When was that; what year?

A. I don't remember the year.

56 X Q. Haven't you ever tried to do business on your own hook since?

A. Yes; this millinery business, together with my wife.
57 X Q. But never as O'Keefe Brothers?
A. No.
58 X Q. Or otherwise on your own account?
A. No.
59 X Q. Where have you lived during the year and a half that you have been doing business at Brockton?
A. In Brockton.
60 X Q. Where while with Houghton & Dutton?
A. In Brockton and Boston.
61 X Q. Where while with Shepard, Norwell & Co.?
A. In Worcester and Boston.
62 X Q. In your previous testimony, which you say you have read, you told a story of a little girl and say that a young lady clerk said she had been substituting Merrick's thread for Coats', and you told her "it was not best to do that, especially with children." Where did that happen?

Objected to as immaterial and not called out by the direct.

A. At 46 Front street.
361 63 X Q. What was the young lady's name?

Same objection.

A. I don't recollect.
64 X Q. Can't you tell who your clerk was at that time?

Same objection.

A. No; on that counter we had six or eight.
65 X Q. Describe her, because we wish to call upon her and see what she says about it. Give us all the information that will lead us to that young lady that you are possessed of.

Same objection.

A. She was some one of the girls, and I can't describe which one.
66 X Q. Give the names of as many as you can.

Same objection.

A. There was Mary Riley, Lizzie Brosnihan, Lizzie O'Keefe, and Lizzie A. O'Keefe; that's all I can call to mind, though there were others.
67 X Q. What relation were these O'Keefe girls to you, if any?

Same objection.

A. Lizzie A. was a sister and Lizzie was a cousin.
68 X Q. Was it either your sister or your cousin, do you think, that cheated customers in the way you have stated, and to whom you said it was not best to do so, "especially to children"?

Same objections.

A. I don't recollect.

362 69 X Q. Well, do you think it was either of those two girls? Give your best impression.

Same objections.

A. I haven't any recollection on that point.

70 X Q. Do you think they are girls likely to cheat in that way?

Same objections.

A. That's a question I can't answer.

71 X Q. Why were your directions that the lady clerk shouldn't do that, "especially with children;" was it because you were willing they should cheat older people? Your answer reads as follows:

"The young lady clerk called my attention to the fact that she had been substituting Merrick's for Coats', and I told her it was not best to do that, especially with children."

Same objections.

A. No.

72 X Q. Why, then?

Same objections.

A. My direction to the clerk was not to sell the thread for other than it was represented, especially to children, who could not see for themselves and would rely on the word of a clerk.

73 X Q. Your idea being that older people would see for themselves; was that it; and so your caution was applicable to children?

Same objections.

A. It was applicable to both.

74 X Q. Why did you make the exception and say "especially with children," as though you were willing it should be practised on older people? Can you tell that?

363

Same objections.

A. I wasn't willing that deception should be practised on older people, but mentioned children from the fact that parents expect unusual attention paid to children when they send them shopping.

75 X Q. Can't you now, on further reflection, tell us who the young lady was?

Same objections.

A. I can't seem to recollect.

76 X Q. Who was the little girl?

Same objections.

A. I can't remember that now.

77 X Q. Did you ever know?

Same objections.

A. I knew at the time.

78 X Q. Well, since then, I mean.

Same objections.

A. I think I knew when I testified before.

79 X Q. Can't you possibly tell now?

Same objections.

A. I have been out of Worcester so long that the names of people have slipped from my mind somewhat.

80 X Q. Of whom did you buy your first lot of Merrick's thread that you had in the store?

A. From C. A. Potter.

81 X Q. Was C. A. Potter the man you bought out?

A. Yes, sir.

82 X Q. The first time you were in business as O'Keefe Brothers or the second?

A. The first time.

364 83 X Q. How much Merrick's thread did you buy when you bought out the stock of C. A. Potter?

A. I can't recollect exactly.

84 X Q. About how many dozen do you think?

A. I couldn't form an estimate even.

85 X Q. Did you buy Merrick thread of the Merrick Company or its agents more than once?

A. I don't recollect that.

86 X Q. Who was the agent?

A. I don't remember his name.

87 X Q. Can you remember purchasing the Merrick thread of any agent of the Merrick Company more than once?

A. I remember giving an order once to a man who claimed to be their agent, but whom the company refused to recognize as such and did not send the goods.

88 X Q. Do you remember any other?

A. Shortly after I remember one.

Recess to 2.30 p. m.

2.30 P. M.

89 X Q. In whose name do you do business at present?

A. In my wife's name.

Redirect by Mr. BETTS:

90 Re-D. Q. Who was the man you refer to in answer to cross-question 87?

A. William G. Pierce.

JOSEPH O'KEEFE.

Sworn to and subscribed before me this 31st day of January, 1888.

THOMAS HUNT,
Special Examiner.

365 Circuit Court of the United States for the Southern District of New York.

Sir PETER COATS *et al.*, Complainants,
vs.
THE MERRICK THREAD CO. *et al.*, Defendants. } In Equity.

Notice is hereby given that we shall proceed to take proofs *de bene esse* for final hearing on the part of the complainants in accordance with the statutes in such cases made and provided and in pursuance of the rules and practice of this court before the clerk of the U. S. circuit court for the northern district of Illinois or other proper officer, under said statutes and rules, at his office, in the United States court-house, Chicago, Illinois, on the 25th day of January, 1888, at 11 o'clock in the forenoon.

The names and residences of the witnesses who live at a greater distance from the place of trial than one hundred miles whom it is intended to examine are stated below.

You are invited to attend and cross-examine any witness produced. The examination will be adjourned from day to day and from such time and place as may be required without further notice.

Dated New York city, Jan. 20th, 1888.

BETTS, ATTERBURY, HYDE & BETTS,
Complainants' Counsel, 120 *Broadway, New York.*
VARNUM & HARISON, *Complainants' Solicitors.*

To Witter & Kenyon, Esq's, defendants' solicitors.

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Names of witnesses.	Residence.
C. D. Beale	Chicago, Ills.
Annie Miller	" "
Mrs. C. E. Brown	" "

Circuit Court of the United States for the Southern District of New York.

Sir PETER COATS *et al.*, Complainants,
vs.
THE MERRICK THREAD CO. *et al.*, Defendants. }

Examination of witnesses on behalf of the complainants pursuant to the foregoing notice, before William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, at his office, room 45, Custom-House building, in the city of Chicago, Illinois.

Present: Mr. E. G. Mason, counsel for complainants; Mr. Wm. C. Witter, counsel for defendants.

Testimony of Mrs. Brown.

Int. 1. What is your name, age, residence, and occupation?

A. Mrs. Cornelia E. Brown; am 54 years old; I reside at 1232 Wabash avenue, Chicago; I am doing braid-work at present.

367 Int. 2. State whether you have lately visited any stores in Chicago for the purpose of purchasing spool cotton.

A. I did.

Int 3. At whose request?

A. At the request of Mr. Beale.

Int. 4. State what spool cotton you asked for on those occasions.

A. I asked for No. 30 "Coats'."

Int. 5. State whether, having asked for Coats' cotton, you received any other make of cotton.

A. I did.

Int. 6. When and where?

A. It was between the 12th and 18th of December last, at No. 913 Clybourne avenue, Chicago.

Int. 7. State what you asked for, who served you, and the manner in which the purchase was made of the spool cotton referred to.

A. I asked for No. 30 Coats' cotton. A saleslady served me. She went a few steps, wrapped up the cotton spools, received the pay without showing them to us, and handed them to be wrapped up. We examined them immediately upon leaving the store and found that the cotton spools were Merrick's instead of "Coats'."

Int. 8. Did you see whose make of spool cotton those were which you bought before they were wrapped up?

A. I did not.

Int. 9. Did you know whose manufacture they were until you examined them after leaving the store?

A. I did not.

Int. 10. Will you produce the spools bought by you on that occasion?

A. I do so. They are two spools No. 30 of the Merrick Thread Company.

The spools produced by the complainants' witness are made complainants' exhibits and marked Brown spools 1 and 2 by me, to which I add my initials.

Int. 11. How did you pay for these spools?

368 A. I paid for them in money—five cents per spool—to the saleslady of whom I purchased them.

Int. 12. Who was with you on the occasion referred to?

A. Annie Miller only.

Int. 13. State whether, having asked for Coats' cotton spools at any other stores in Chicago, you received any other make of cotton; and, if you did, when and where.

A. I did; at No. 310 West Polk street, Chicago, and No. 1662 Milwaukee avenue, Chicago, between the 12th and the 18th of December last.

Int. 14. State what you asked for at the two last above-mentioned places, who served you, and how the purchases were made.

A. I asked for Coats' No. 30 cotton, and at those two numbers they wrapped me up two spools each of Merrick's instead of Coats' without showing to me. I paid five cents a spool for them; do not remember who served me; could not describe persons who served me.

Int. 15. Did you see whose make of spool cotton bought on these occasions were before they were wrapped up?

A. I did not.

Int. 16. When did you examine them?

A. Immediately upon leaving the stores.

Int. 17. Did you know whose manufacture they were until you examined them?

A. I did not.

Int. 18. Will you produce the spools you bought on the two last-mentioned occasions?

A. I produce four spools No. 30 Merrick's thread, two of which I bought at one of the last-named places and two at the other.

They are offered in evidence by complainants and made exhibits and marked Complainants' Exhibits Brown's Spools by me, Nos. 3, 4, 5, and 6.

Int. 19. How did you pay for these four spools?

A. I paid in money—five cents apiece.

369 Int. 20. At whose request did you come here to testify?

A. At Mr. Beale's.

The testimony of this witness is here seasonably objected to as not in rebuttal, as evidence tending toward making out a new *prima facie* case, and as incompetent.

Cross-examined by Mr. W. C. WITTER, counsel for defendants:

Cross-int. 21. Is the Mr. Beale referred to in your testimony C. D. Beale, and is he here present?

A. He is, and he is here present.

Cross-int. 22. Were you subpœnaed to testify in this case?

A. I was not.

Cross-int. 23. Who keeps the store at 913 Clybourne avenue?

A. There was no sign over the door; we had to rely upon the number. I don't know the name of the proprietor or of an-body in the store.

Cross-int. 24. Describe the saleslady who served you at 913 Clybourne avenue, stating apparent age and appearance.

A. As well as I can remember she was of medium height, rather light than dark; a middle-aged lady; married, I believe. I don't speak very positively about it.

Cross-int. 25. Were you alone; if not, who was with you?

A. Annie Miller, here now present, was with me.

Cross-int. 26. Where was the second place at which you called and made a purchase about which you have testified?

A. I don't remember the exact routine which we followed, and I cannot say whether the second place was 310 West Polk street or 1662 Milwaukee avenue.

Cross-int. 27. What was the name of the proprietor at 316 West Polk?

370 A. There was no name on the door.

Cross-int. 28. Have you a memorandum to that effect in the little memorandum book from which you are reading?

Objected to by Mr. Mason as being irregular, immaterial, and not proper cross-examination.

A. This is just the way I have entered it on my book exactly: "310 Polk street; asked for Coats'; wrapped up Merrick's."

Cross-int. 29. Have you any knowledge or information as to who keeps the store at No. 310 Polk or West Polk street?

Same objection.

A. It must be West Polk street, because there is no number so high on this side of the river. I don't know anything about who keeps the store. It is the first time I ever went there.

Cross-int. 30. What was the name of the proprietor at 1662 Milwaukee avenue?

Same objection by Mr. Mason.

A. Don't know. I just had to rely on the number there.

Cross-int. 31. What sort of person served you at 1662? Describe the person.

A. I do not remember. I cannot describe the person. I paid more attention to the transaction than to the person.

Cross-int. 32. What sort of person served you at 310 W. Polk street?

A. I don't remember that, either.

Examination adjourned till January 26, at 10 a. m.

371 CHICAGO, *January* 26, 1888.

Present: Counsel and parties as before.

Cross-int. 33. Was it a man or a woman who served you at 1662 Milwaukee avenue?

A. I can't remember.

Cross-int. 34. Was it a man or a woman or a girl who served you at 310 West Polk street?

A. I don't remember that, either; only made a note of the transaction.

Cross-int. 35. Was it a male or female at 913 Clybourne avenue?

A. I remember distinctly that it was a woman.

Cross-int. 36. Was it a woman grown or a girl?

A. A woman grown.

Cross-int. 37. You have said that you asked for Coats' thread No. 30 at each of these three places. Was Annie Miller with you at each of the three places and present while each purchase was being made?

A. She was.

Cross-int. 38. Who asked for the Coats' No. 30 thread at each place, you or Annie Miller?

A. Myself.

Cross-int. 39. Did you conduct the transaction entirely—that is, do the talking, receive the thread, pay for it, etc.?

A. I did.

Cross-int. 40. What part did Annie Miller take, or was she simply a witness to the proceedings?

A. She just witnessed what I did.

Cross-int. 41. And said nothing?

Same objection.

A. Don't remember particularly that she said anything; can't recall anything she said in the store—that is, in regard to the purchase.

Cross-int. 42. Why did you take Annie Miller along with you; were you requested to?

Same objection.

372 A. Mr. Beale employed us both to buy some thread for him.

Cross-int. 43. And were you both present when he so employed you?

Same objection.

Ans. I don't remember that. We met by appointment at Le Baron Holt's, on Adams street, by Mr. Beale's appointment.

Cross-int. 44. All three of you?

A. The first day we went out we did not meet him. We simply had instructions from him through another party.

Cross-int. 45. What day of the month was the first day you went out? Look at your memorandum book to assist your memory if you wish to.

Same objection.

A. It was somewhere between the 12th and 18th of December, 1887, but I did not notice the day of the month; merely noted the transactions.

Cross-int. 46. Who was it through whom Mr. Beale gave instructions on which you acted the first day?

Same objection.

A. She is forelady for J. S. Baer, and I think her name is Carrie Sutor; Carrie, anyway.

Cross-int. 47. Where is J. S. Baer's place of business?

Same objection.

Ans. On Adams street between La Salle and Fifth avenue, above Le Baron Holt's.

Cross-int. 48. Mr. Beale has his office in Le Baron Holt's, doesn't he?

Same objection.

A. That I could not say.

373 Cross-int. 49. Where did you go the first day?

Same objection.

A. I would have to refer to my book.

Cross-int. 50. Please do so.

A. But I can't give you the whole routine, because some of the streets I was not familiar with.

Cross-int. 51. With the aid of your book, state as fully as you can where you went the first day.

Same objection.

A. Must I do that, Mr. Mason?

Mr. Mason responds in the affirmative, and states to the witness that it is her duty to answer all questions.

Cross-int. 52. With the aid of your book, state as fully as you can where you went the first day.

Same objection.

A. Well, the first place was Cottage Grove avenue, No. 3520; then 571 Thirty-first street, then 2943 Archer avenue, and then 3041 Archer avenue, 3216 Wentworth avenue, 4950 Wentworth avenue, 4355 Wentworth avenue, 4318 Wentworth avenue, Forty-first street and Wentworth avenue, 3933 Wentworth avenue, 355 Twenty-fourth street. As near as I can remember, that ended that day's transactions.

Cross-int. 53. Now, if I understand you, it was the next day after these visits that Mr. Beale himself had you and Annie Miller meet him at Le Baron Holt's and gave instructions in person. Is that so?

Same objection.

A. It was not the day following, because that was Sunday, but it was on Monday morning that Mr. Beale gave the instructions in person. It was at Mr. Baer's and not at Le Baron Holt's.

374 Cross-int. 54. Will you now, with the aid of your book, state as fully as you can where you and Annie Miller went on the second day's work—that is, Monday?

Same objection.

A. 381 North Clark street, 353 East Division street, 43 Clybourne avenue, 933 Clybourne avenue, 925 Clybourne avenue. It took us so long to go to those places that I don't think we did any more that day. It was an awful day.

Cross-int. 55. When did you next see Mr. Beale after receiving the instructions on Monday morning?

Same objection.

A. On the following Thursday morning at 10 o'clock.

Cross-int. 56. Where?

Same objection.

A. At Mr. Baer's.

Cross-int. 57. Will you now state as fully as you can where you and Annie Miller went on Tuesday of that week (referring to your book)?

Same objection.

A. As near as I can remember, we went to 2116 Wabash avenue. We had overlooked 2212 Wentworth avenue, so we went there; 2502 South State street, 327 West Polk street, 312 West Polk street, 310 West Polk street, and then went over to Portland avenue and Twenty-third street, 2514 State street. I think that ended that day's transactions, but I wouldn't say positively.

Cross-int. 58. Will you now state as fully as you can where you and Annie Miller went on Wednesday of that week (referring to your book)?

Same objection.

375 A. 803 Milwaukee avenue, 111 West Huron street, 136 West Huron street, 481, I think it was, West Superior street. Sometimes I got a little turned around. No; that was a dwelling-house after all—331 North May street. Now, in noting these down, I had a sheet of foolscap paper and then transferred my notes to this book; so I cannot be sure of the routine, but I can be sure I visited all the places.

Cross-int. 59. Now, if I understand you, it was on Thursday morning at 10 that you again saw Mr. Beale; is that so?

Same objection.

A. That is correct.

Cross-int. 60. And did you then report to him the result of your labors?

Same objection.

A. I did.

Cross-int. 61. What next happened?

Same objection.

A. I don't hardly know how to answer that question, only we didn't work any farther.

Cross-int. 62. Do you mean that you made no visits on Thursday at all?

Same objection.

A. That is what I mean.

Cross-int. 63. Where and from whom did you get the sheet of foolscap paper you refer to and where is it now?

Same objection.

A. I furnished it myself and then transferred the transactions to this book, and then the paper was of no further use, so I didn't keep it.

376 Cross-int. 64. What did you do with it?

Same objection.

A. I don't remember what I did do with it; guess I threw it away.

Cross-int. 65. How did you come by these various localities that you visited in the first instance—who furnished them to you?

Same objection.

A. Mr. Beale gave them to me—with one exception that I remember of—and he gave me permission to go into places at my own option. I can remember only one; that was 913 Clybourne avenue.

Cross-int. 66. How did you happen to go there?

Same objection.

A. I don't know of any other answer except that it was a store where they sold thread.

Cross-int. 67. Do you or did you know of any one there?

Same objection.

A. No.

Cross-int. 68. Have you now mentioned since we began this morning all the places that you and Annie Miller visited?

Same objection.

A. We went to 783 Milwaukee avenue, 772 Milwaukee avenue, 891 Western avenue, 1612 Milwaukee avenue, but, as near as I can remember, I think I went there on my own option. The next was 1662 Milwaukee avenue, 583 West Ohio street, 206 North Ashland avenue, 325 North Carpenter street—525 Chicago avenue had been burned out recently—493 North Wood street; that ends the entire list.

377 Cross-int. 69. Were these places mentioned in your last answer visited in one of the four days you have referred to—Saturday, Monday, Tu-sday, or Wednesday—between the 12th and 18th of December, 1887?

Same objection.

A. They were.

Cross-int. 70. Now, state what bargain Mr. Beale made with you and Annie Miller under which she and you did this work.

A. Witness asks, "As to remuneration?"

Cross-int. 71. Yes.

A. Didn't make any bargain.

Cross-int. 72. Did you and Annie Miller do it out of friendship or what?

Same objection.

A. I supposed, of course, that Mr. Beale was an honorable man and would pay us for what we did.

Cross-int. 73. And you expect to be paid by him, do you not?

Same objection.

A. There's been nothing said about it. He can pay me if he likes. There was nothing said about it.

Cross-int. 74. You really expect to be paid for it, don't you, or is it merely hope that you indulge?

Same objection.

A. I have no reason to expect it at all; no reason to expect it.

Cross-int. 75. Did you pay your own car fares?

A. I walked.

Cross-int. 76. But you sometimes rode in the cars, did you not—street cars?

A. You mean while I was doing the work?

Cross-int. 77. Of course.

A. Oh, while I was doing the work. Yes.

378 Cross-int. 78. Did you pay your own car fare and Annie Miller's?

Same objection.

A. No; I didn't pay my own car fares.

Cross-int. 79. Who did.

Same objection.

A. Must I answer that question?

Cross-int. 80. I think so.

A. Mr. Beale gave me the money to pay our car fares, as it was his work. We were working for him.

Cross-int. 81. What do you mean in your answer to the first question where you say "I am doing braid-work at present"?

A. It is trimming for ladies' dresses and I do it as my own home for J. S. Baer.

Cross-int. 82. How long have you been doing this or other work for J. S. Baer?

Same objection.

A. Winter before last I did work for Klein & Baer. That was the style then. Last spring a year ago for Klein, Baer & Rosenberg. Last spring and ever since for J. S. Baer, except during the summer; resumed in the fall and continued through the winter till the present time.

Cross-int. 83. And Carrie, or Carrie Sutor, is forelady for J. S. Baer, I believe you said?

A. Yes; that is so; since J. S. Baer went for himself.

Cross-int. 84. What thread do you use in your braid-work?

Same objection.

A. We use, I think, Crowley's a good deal; sometimes one kind, sometimes another.

379 Cross-int. 85. What other kinds?

Same objection.

A. Sometimes use Merrick's, and then there's another kind that I don't remember the name of just now.

Cross-int. 86. How did Mr. Beale happen to select you for this work and how did you happen to select Annie Miller?

Same objection.

A. If I know anything about it, he selected me through Carrie or Carrie Sutor. He had never heard of me at all. I had nothing to do with selecting Annie.

Cross-int. 87. Who did?

Same objection.

A. I can't tell you that for the reason I don't know.

Cross-int. 88. Who is she and what does she do and when did you make her acquaintance?

Same objection.

A. She is an employee of J. S. Baer's, and I first met her to know her when we first started out on the Saturday morning. You see there are a great many of them there and I don't take particular notice.

Cross-int. 89. Were Carrie's or Carrie Sutor's instructions to you verbal or in writing on that Saturday morning?

Same objection.

A. They were verbal.

Cross-int. 90. And were both you and Annie Miller present when they were given?

Same objection.

A. We were.

380 Cross-int. 91. What do you make a day working for J. S. Baer?

Same objection.

A. I don't work by the day. I work by the piece; so much a yard, according to the pattern.

Cross-int. 92. Does what you earn in this form your livelihood?

Same objection.

A. It does not; it helps.

Cross-int. 93. Now, did you not leave your business to engage in this thread hunt thro' the city without some word of assurance from Carrie or somebody that you would be paid for it, did you?

Same objection.

A. I worked till midnight on my braid-work every night, and Carrie said I should be paid for it, but she did not say how much. She gave it as her opinion that I would be paid a dollar a day. I supposed it was to come from Mr. Beale, as he employed me; I naturally inferred that.

Objected to by Mr. Mason as hearsay and as stating the witness' suppositions and inferences.

Witness continues: "It was all supposition, as I did not get Mr. Beale's word for it.

Cross-int. 94. There was a Merrick cabinet on the counter at 310 West Polk street, was there not?

A. I could not state whether there was or not.

Cross-int. 95. And also at 1662 Milwaukee avenue, was there not?

A. That I don't remember. I do remember that we did
381 sometimes get Coats' out of Merrick's cabinets and sometimes Clark's. The cabinets bore no indication of the kind of thread kept in them at all.

Answer after the word "remember" objected to by Mr. Mason as not responsive to nor called for by question.

Cross-int. 96. And also there was a Merrick cabinet at 913 Clybourne avenue, was there not?

A. I did not see it that I recollect of.

Cross-int. 97. When you say "you sometimes got Clark's out of Merrick cabinets" do you mean Clark's O. N. T. or Clark's Mile-end?

Same objection as to previous questions.

A. I think it was the Mile-end; it was the black spool, and I have some of it in my possession.

Cross-int. 98. How many spools of it?

Same objection.

A. I don't think I had originally more than six. I gave some of them away.

Cross-int. 99. Can you tell by memory or referring to your memorandum book at which of the places you have named you received this Clark's Mile-end thread?

Same objection.

A. I cannot; I got the Clark's and Coats' mixed up.

Cross-int. 100. About how much are you able to earn in a day, working for J. S. Baer by the piece?

Same objection.

A. It is impossible to tell you, because I have interruptions some days.

Cross-int. 101. Gauge it as near as you can.

Same objection.

A. Well, I couldn't answer the question.

382 Cross-int. 102. You make more than a dollar a day?

Same objection.

A. Oh, no; I don't make a dollar a day; not at present prices. Originally I did.

Cross-int. 103. In answer to questions 2, 3, 4 and elsewhere in your deposition you have said that on these visits you have told us about

you asked for Coats' No. 30 thread. Why did you ask for No. 30 thread instead of some other number?

A. I don't know, except that that was my instructions.

Cross-int. 104. And that was why you asked for Coats' thread, was it—simply because your instructions were to do so?

A. It was.

Cross-int. 105. And in most of the places you got what you asked for—that is, Coats' or Coats' No. 30?

Same objection.

A. I don't remember how many spools of Coats' I did get. Some had Coats', but not in number 30, and in such cases we did not take any, for that was not our instructions.

Cross-int. 106. Was Monday morning between the 12th and 18th of December the first time you had ever seen Mr. Beale?

A. Yes; that was the first time I ever saw him.

Cross-int. 107. You spoke of the thread—the Coats' and Clark's thread—being sometimes taken out of the Merrick cabinets. You mean, I suppose, out of the drawers of the cabinets, do you not?

Same objection.

A. I think so, for they would go and search for the thread in the drawers before they answered me.

383 Cross-int. 108. About how many drawers does such a cabinet have?

Same objection.

A. I haven't any idea; didn't notice.

Cross-int. 109. Is your husband living?

A. He is not; he died in 1865.

Cross-int. 110. Can you give any other word of description or information which may lead to identifying the person who served you at 310 West Polk street or 913 Clybourne avenue or 1662 Milwaukee avenue? If you can, please do so in answer to this question.

A. I cannot, except that the one at 913 Clybourne avenue was a woman. The others I can't recall.

CORNELIA E. BROWN.

384 ANNIE MILLER, a witness called on behalf of complainant, being duly sworn, deposes and says:

Examined by Mr. MASON:

Int. 1. What is your name, age, residence, and occupation?

A. Annie Miller; 30 years old; 488 Sedgwick street; my occupation is passementerie or braid-work.

Int. 2. State whether you have lately visited any stores in the city of Chicago for the purpose of purchasing spool cotton; and, if so, at whose request.

A. I did at Mr. Beale's request.

Int. 3. State what spool cotton you asked for on the occasion referred to.

A. Coats' cotton No. 30.

Int. 4. State whether, having asked for Coats' cotton, you received any other make of cotton; and, if so, when and where.

A. I did; I received Merrick's. I only remember one place—913 Clybourne avenue. It was between the 12th and 18th of December last.

Int. 5. State what you asked for at 913 Clybourne avenue; describe the person who served you and the manner in which the purchase was made.

A. I asked for No. 30 Coats' thread. She walked to the drawer and handed two spools of thread. She was a medium-sized woman, between 30 and 40 years old. She looked rather German than American.

Int. 6. To whom did she hand these spools of thread?

A. To Mrs. Cornelia Brown.

Int. 7. Were these spools handed to Mrs. Brown loose or wrapped up?

A. They were wrapped up in paper.

Int. 8. By whom were they wrapped up?

A. By the lady who kept the store.

Int. 9. State, if you know, when these spools were first unwrapped after they were purchased.

A. Soon after leaving the store.

385 Int. 10. Did you see them unwrapped; and, if so, what make of cotton did you find the spools to be?

A. I seen them unwrapped and found that it was No. 30 Merrick's.

Int. 11. Did you see whose make of spool cotton these spools were before they were wrapped up?

A. I did not.

Int. 12. Did you know whose manufacture they were until you saw them unwrapped?

A. I did not.

Int. 13. Can you identify the two spools of which you speak?

A. Mrs. Brown had those.

The witness is shown the two spools marked Complainants' Exhibit Brown 1 and 2 and asked:

Int. 14. Are those the two spools of which you speak?

A. Yes, sir.

Int. 15. Who paid for these spools and how were they paid for?

A. Mrs. Brown paid for them, even change, five cents a spool.

Int. 16. State whether this was done in your presence.

A. Yes, sir; it was.

Int. 17. State whether on any other occasion having asked for Coats' cotton you received any other make of cotton; and, if so, when and where.

A. I don't remember the other places.

Int. 18. State whether you ever visited No. 913 Clybourne avenue again for the purpose of purchasing spool cotton.

A. Yes; I did.

Int. 19. When was this?

A. I don't remember the date.

Int. 20. State, if you can, between or about what dates it was.

386 A. It was between the 12th and 18th of December last.

Int. 21. State whether on the last-mentioned occasion having asked for Coats' cotton you received any other make of cotton.

A. I asked for No. 50 Coats' and received Merrick's.

Int. 22. Describe the person who served you and the manner in which this purchase was made.

A. The same person served me. She spoke to me while she wrapped up the thread and gave it to me.

Int. 23. When was this thread unwrapped and by whom?

A. I unwrapped it when I got to the store of Mr. Beale.

Int. 24. How long after you bought it was this done?

A. Three-quarters of an hour after.

Int. 25. State, if you can, how many spools you purchased on this occasion and what make of cotton you found them to be.

A. Five spools of cotton and found they were Merrick's.

Int. 27. Did you see whose make of cotton these five spools were before they were wrapped up?

A. I did not.

Int. 27. Did you know whose manufacture they were until you unwrapped them at the store?

A. I did not.

Int. 28. Will you produce the spools you bought on that occasion?

A. I do.

The five spools produced by the witness are offered in evidence by the complainants' counsel and marked Complainants' Exhibit Miller Spools 7, 8, 9, 10, and 11.

Int. 29. How did you pay for these spools and to whom?

A. To the lady; a quarter—five cents a spool.

Int. 30. Was any one with you on this occasion?

A. No; I was alone.

387 Int. 31. Who was with you on the first occasion to which you have testified?

A. Mrs. Cornelia Brown only.

Int. 32. Did you visit any other stores with Mrs. Brown for the purpose of purchasing spool cotton?

A. I did so.

Int. 33. State, if you can, at what other store she made such purchases while you were with her.

A. I don't know any of the numbers.

Int. 34. At whose request did you come here to testify?

A. At Mr. Beale's.

The testimony of this witness is here seasonably objected to as not rebuttal, as evidence tending toward making out a new *prima facie* case, and as incompetent.

Cross-examined by Mr. WITTER:

Cross-int. 35. You say that when Mrs. Brown bought the two spools of cotton, No. 30 Merrick, that the lady walked to the drawer and handed her the spools; what drawer? Do you mean the drawer of a Merrick cabinet?

Same objection as before by Mr. Mason.

A. I could not describe it.

Cross-int. 36. Why do you say she walked to the drawer if you can't tell what it was; wasn't it a little drawer in a little box or case of drawers known as a Merrick cabinet?

Same objection.

A. It was a case drawer.

Cross-int. 37. Where did the case set, on the counter or where?

Same objection.

A. It stood on the counter.

388 Cross-int. 38. Can you read?

A. Yes, sir.

Cross-int. 39. Wasn't the word Merrick's on that case of drawers in plain sight?

Same objection.

A. I am not sure of that.

Cross-int. 40. You were there twice, as it seems. Don't you think it said Merrick on that case of drawers? You say you were not sure. Don't you think it did?

Same objection.

A. I think it did.

Cross-int. 41. And the lady took the five spools which you bought out of the same Merrick case that she took the two spools that Mrs. Brown bought, didn't she?

Same objection.

A. I could not remember.

Cross-int. 42. There was no other cabinet there, was there, except the Merrick cabinet that you saw, was there?

Same objection.

A. I did not notice any other.

Cross-int. 43. Now, come to think of it, don't you think she took the five spools out of the drawer of that cabinet?

Same objection.

A. I think she did.

Cross-int. 44. Well, that was one of the ways you knew the thread was Merrick's thread, wasn't it, because it was taken out of a Merrick cabinet; is not that true?

Same objection.

389 A. Yes, sir.

Cross-int. 45. And then you saw the name Merrick's on the spool, too, didn't you, and knew it in that way also; is not that true?

A. I did not know it until I brought it to the store—to Mr. Beale's. I did not look at the spools.

Cross-int. 46. Why didn't you look at the spools before that?

Same objection.

A. Because I was not instructed to do so.

Cross-int. 47. Do you mean you was instructed not to do so?

Same objection.

A. He did not tell me to look at them; therefore I did not do so.

Cross-int. 48. Didn't you look to see whether the number was what you asked for—that is, No. 50?

A. No, sir; I did not.

Cross-int. 49. But when you did look at them afterwards you saw that they were Merrick's, did you not, without any difficulty?

A. Yes, sir.

Cross-int. 50. Because the name Merrick was plainly on the spool; is not that so?

A. Yes, sir.

Cross-int. 51. Now, if you wanted to buy for your own use No. 30 Coats' thread, and didn't want any other, you in the first place would ask for 30 Coats' thread, wouldn't you?

Same objection.

A. Yes, sir.

Cross-int. 52. And when the spool was handed to you you would look at the name and number to see if it was Coats' and if it was the right number, wouldn't you?

A. Yes, sir.

390 Cross-int. 53. And you would do likewise if you wanted any other particular make of thread—that is, you would ask for it by its name and of the number desired, and then look to see whether you had got the kind and number which you wanted; isn't it?

Same objection.

Cross-int. 54. These threads are known by their name, are they not; as, for example, Coats,' Merrick's, Willimantic, Clark's O. N. T. or Clark's Mile-end, etc., are they not?

Same objection.

A. Yes, sir.

Cross-int. 55. Did you ever know either of them to be known in any other way except by their name?

Same objection.

A. No, sir; I did not.

Cross-int. 56. When you and Mrs. Brown went around to these very numerous places in all these streets and avenues, you got some Willimantic thread when you asked for Coats,' didn't you?

Same objection.

A. Not by that name.

Cross-int. 57. Who is the proprietor at 913 Clybourne avenue?

A. I do not know the name.

Cross-int. 58. You are not acquainted there?

A. No, sir; not at all.

Examination adjourned to 10 a. m., January 27th.

391 10 A. M., JANUARY 27TH.

Present: Counsel and parties as before.

Cross-int. 59. How did you identify the two Merrick spools handed you yesterday as the two that were bought by Mrs. Brown in your presence at 913 Clybourne avenue? Answer the question first without looking at any of the exhibit spools.

A. They were marked with a cross.

Cross-int. 60. How did you happen to go to 913 Clybourne avenue a second time? Did Mr. Beale send you?

A. He did so.

Cross-int. 61. Why did he want you to go again?

A. He did not tell me anything of it.

Cross-int. 62. On which side of the street is the shop located?

A. On the west side of the street.

Cross-int. 63. Was your second visit made on the last day of your labors in that direction?

A. Yes; it was on the last day.

ANNIE MILLER.

392 Circuit Court of the United States, Southern District of New York. In Equity.

Sir PETER COATS *et al.*
vs.
THE MERRICK THREAD COMPANY *et al.*

Evidence for Complainants.

BOSTON, *Feb.* 10, 1888.

Present: Samuel R. Betts, Esq., of counsel for complainants; William C. Witter, Esq., of counsel for defendants.

Before me—John G. Stetson, examiner.

Deposition of William E. Bowker (Recalled).

Direct examination by Mr. BETTS:

Int. 1. State your name, age, residence, and occupation.

A. William E. Bowker; 46; Charlestown, Mass.; dry and fancy goods, 186 Hanover street, Boston; ladies' and gents' furnishings.

Int. 2. How long have you been at 186 Hanover street?

A. A little over two years, I think.

Int. 3. Are you the William E. Bowker who testified in this case in New York city on December 22, 1884?

A. I am. I think that was about the time.

Int. 4. Have you to-day read the printed copy of the testimony that you gave at that time?

A. I have glanced over it.

393 Int. 5. I call your attention to Ints. and Ans. 9 to 16, inclusive, of that testimony. Please read them now carefully. I also call your attention to the evidence given by William G. Pierce on the part of defendants (Ints. and Ans. 14, 15, 16, 21, 22, 23, 24, 25, 26, 27). Please read these also.

A. I have read as requested.

Int. 6. When Mr. Pierce says in his answers to Ints. 21, 22, and 25 substantially that he never sought to convey to your mind by any expression that there was any resemblance between the spools, spool heads, marking or labeling, or outward appearance of the Merrick thread as compared with Coats', is that testimony true or false?

A. He certainly did make the statements referred to there in my store on Washington street, and I think also in Hanover street. I will not be positive whether the thread was delivered on Washington street or Hanover; the contract was made on Washington.

Int. 7. How long after the making of this contract with Pierce that you referred to did you move from Washington to Hanover street?

A. I could not say accurately, as I was only on Washington street a very short time.

Int. 8. State whether it is your recollection that statements that you have testified to as made by Mr. Pierce in regard to similarity between Coats' and Merrick's spools were made to you during the period you were on Washington street.

A. They were, to the best of my knowledge.

Int. 9. Mr. Pierce, in answer to Int. 25, says substantially that you never made a remark to him to the effect that Merrick's looked very much like Coats', as you have testified to in answer to Int. 16 of your testimony given Dec. 22, 1884. Is that statement of Mr. Pierce true?

A. I certainly made the remark.

Int. 10. On reading over your testimony given on Dec. 22, 1884, particularly in answer to Ints. 9 to 16, and in view of the testimony Mr. Pierce has given, which you have also read, denying the
394 facts you testified to, do you desire to make any change in your testimony?

A. I see I said 150 to 200 dozen. I cannot say accurately the amount now, as I haven't looked it up. It might have been more or it might have been less. I can't say the amount accurately now any more than I could then. It might have been that amount and it might have been more or less, as I cannot say accurately. That is the only change that I see that I desire to make.

Int. 11. Mr. Pierce, in his testimony for defendants, in answer to

Ints. 53 to 59, inclusive, testified to an interview with you, at which you told him about testifying for complainants in New York and urged him to go on to New York and testify. Did you ever have such an interview with Mr. Pierce?

A. I have no remembrance of it.

Int. 12. Did you ever urge Mr. Pierce to go and see Coats & Company in Boston and tell them you could get them fifty dollars for testifying in the suit with the Merrick Thread Company?

A. I have no remembrance of it, and I don't see how I could, for they had never spoken to me concerning it—I mean they had never spoken concerning getting William G. Pierce or any witness that I know of, or I don't think Coats ever did, as near as I can remember to-day.

Int. 13. Did Mr. Pierce ever tell you, referring to the testimony you had given for Coats' people on this case in New York, that you "knew you told that which was not true"?

A. He did not. If I understand that question rightly, it means that he told me that I knew I had testified falsely in New York. That is the way that I understood that question.

Int. 14. Did you ever say to Mr. Pierce, in connection with the testimony you gave in New York, "Well, I have got my thirty-five dollars, anyway, and will do what I can to injure the Merrick Thread Company"?

395 A. I have no remembrance, and I don't know how I should, for I don't think I would do anything purposely to injure the company, not out of malice.

Int. 15. Did Mr. Pierce ever say to you substantially as follows: That if he (Pierce) should go on as a witness for Coats Company he would do them more harm than good, as what you testified to was false—that is, as representing this sale of Merrick thread to you?

A. Not to the best of my knowledge.

Cross-examination by Mr. WITTER:

Int. 16. How long have you been in your present store on Hanover street?

A. I think a little over two years.

Int. 17. Where were you just previously to that?

A. On Hanover, I think, at 288.

Int. 18. How long?

A. I can't say whether it was three or four years without looking it up, or whether it was more than two, but I think it was three or four years.

Int. 19. Where were you immediately previous to your being at 288 Hanover?

A. On Washington street, above Dover. I don't recollect the number.

Cross-int. 20. Have you sued the Merrick Thread Company since you gave your testimony in 1884?

A. Have I sued them? Well, suing would be serving a writ, wouldn't it? Well, all I know about is this, that my counsel, Mr.

Lund, had it and did the business; whether he sued it or not I do not know. He told me that he went and saw them and made a compromise.

Cross-int. 21. What was the suit for?

A. The suit was for some trouble that they made me over a paid bill or a bill that I had paid.

Cross-int. 22. Did Mr. Barr, the agent of the Merrick Thread Company, call upon you about the bill? If so, state the circumstances of that call and what he and you said, as near as you remember it.

Objected to as immaterial.

396 A. I don't know as I am acquainted with Mr. Barr. That may be the gentleman or it may not be, but I don't recognize him as the gentleman that called at my store.

Cross-int. 23. State what was said and done between you and the person who did call upon that matter.

Same objection.

A. I think I was waiting on a customer, and the gentleman presented the bill to me over the show-case. I told him it was paid, if I remember rightly. I think that is about the substance of it. There may have been more.

Cross-int. 24. Didn't he ask you if you had a receipt and would show it?

Same objection.

A. I cannot say without having some time to look it up and think it over, as I suppose that transaction would never have to come up again.

Cross-int. 25. Don't you remember that you declined to say whether you had a receipt or not?

Same objection.

A. I don't remember of doing so. I don't know why I should under the circumstances, because I knew if I did decline and didn't show it they could sue it and make me pay the bill; I mean if I had no receipt and nothing to show if the bill wasn't paid.

Cross-int. 26. Didn't you absolutely refuse to show a receipt while at the same time claiming payment had been made; don't you remember that?

Same objection.

A. I would not say accurately without having time to think it over.

397 Cross-int. 27. The Merrick Company sued you for the amount of that bill, didn't they?

Same objection.

A. There was a gentleman put in my store and said he was a keeper; said he was put there by them.

Cross-int. 28. What was the amount of that bill?

Same objection.

A. I could not say accurately; I think it was somewhere in the neighborhood of twenty-eight dollars.

Cross-int. 29. After they had *said* you produced the receipt did you not?

Same objection.

A. I found the receipt before it was sued and showed it to Mr. Pierce and he promised to let them know concerning it.

Cross-int. 30. But you didn't show it to the Merrick Thread Company or its agent, Mr. Barr, did you, till after suit?

Same objection.

A. After a keeper was put in my store—the gentleman said he was a keeper—I think I sent it up to Mr. Lund by my brother or the young lady in the store, but I think my brother. I have no remembrance of showing it myself personally to either Mr. Barr or the Merrick Company.

Cross-int. 31. As soon as the Merrick Company was aware that you had a receipt they withdrew the keeper and the suit, did they not?

Same objection.

A. They did, and I think I showed the receipt to the keeper or the officer when they came in; I think I did, because I have
398 had no time to think this matter up after coming here and I never supposed I'd have any occasion for it again.

Cross-int. 32. Then you had the Merrick Company sued for damages, did you?

Same objection.

A. I understood Mr. Lund to say that he went and saw them himself and compromised or fixed it up some way; perhaps I may be wrong; he may have brought a suit.

Cross-int. 33. What did you get out of this suit?

Same objection, and witness is instructed by Mr. Betts that if he has any objection to stating he need not answer, but if he has none he may state.

A. Mr. Lund fixed it up; there was some spool cotton sent to the store—I won't be positive how much—and an amount of money—I think it was fifty dollars—went to Mr. Lund, and I haven't fully settled with him yet; what part of that fifty dollars would come to me I don't know; I think it was fifty dollars that Mr. Lund said, but I won't say positive.

Cross-int. 34. You mean you had a running account with Mr. Lund for items of service rendered by him outside of this Merrick suit, and Mr. Lund kept the fifty dollars, if that was the sum, do you?

Same objection.

A. I mean I was indebted to him at the time for other services and he gave me credit for it—the amount, whatever it was.

Cross-int. 35. Where did you show the receipt to Mr. Peirce?

Same objection.

A. In my store, on Hanover street.

399 Cross-int. 36. Was it before or after the Merrick Company put the keeper in?

Same objection.

A. I think it was before, for I don't think I had it afterwards. I think Mr. Lund had it.

Cross-int. 37. The claim against you by the Merrick Company was made and the keeper put in before you went to New York to give your first testimony, was it not?

A. I cannot say accurately about that without having something to refer to, but I think it was; I am not positive.

And, being examined by Mr. BETTS, he says:

38 Re-D. Q. Have you any ill-feeling against the Merrick Company on account of the circumstances referred to in your cross-examination?

A. I have not to-day; am using their cotton right along.

39 Re-D. Q. Was the settlement of the matter satisfactory?

A. Perfectly.

W. E. BOWKER.

Attest: JOHN G. STETSON, *Examiner.*

400 UNITED STATES OF AMERICA, }
District of Massachusetts. }

I, John G. Stetson, a United States commissioner, appointed by the circuit court of the United States of America in and for the district of Massachusetts, first circuit, and examiner in the foregoing-entitled cause of Sir Peter Coats *et al.*, complainants, *vs.* The Merrick Thread Company *et al.*, defendants, pending in the circuit court of the United States for the southern district of New York, duly authorized and empowered to take such evidence as might be adduced by complainants before me to be used in said cause, which evidence is hereto prefixed, do hereby certify that on the several days named in the foregoing evidence, at the office of the clerk of the circuit court of the United States, in Boston, in said district of Massachusetts, — by the counsel for the respective parties to said cause and by the witness William E. Bowker; that said witness, being of sound mind and lawful age, was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause and was then carefully examined, and the said witness did thereupon depose as appears in the foregoing deposition, which deposition was reduced to writing in the presence of the said

witness and when completed *were* read over to the witness and signed by him as and for — depositions in my presence.

I further certify that I am not of counsel or attorney to either of the parties in said cause nor in any way interested in the event thereof.

I further certify that in the taking of said evidence I have complied in all respects with the requirements of the 67th rule in equity, as amended, of the Supreme Court of the United States, and I herewith transmit said evidence under my seal to the clerk of the court in which the cause is pending. This evidence is delivered to Mr. Betts by consent of counsel for both parties.

401 In testimony whereof I have hereunto set my hand and seal this tenth day of February, A. D. 1888.

[SEAL.] JOHN G. STETSON,
United States Commissioner,
District of Massachusetts, Examiner.

Fees.

Examiner's fees, taking and certifying deposition	$10 00
Marshal's fees	
Deponent's fees: William E. Bowker, 1 day, $1.50; travel, two miles, 60 cents	1 60
Total	$11 60

402 U. S. Circuit Court, Southern District of New York, in the Second Circuit.

Sir PETER COATS *et al.*, Complainants,
against
THE MERRICK THREAD COMPANY and HERBERT F. PALMER, Defendants. } In Equity.

Direct interrogatories to be addressed to Frederick Smith, of Burlington, Kansas, on the part of the complainants herein.

1. What is your name, age, residence, and occupation?

2. Are you in business in Burlington, Kansas; and, if so, for how long a time have you been there in business?

3. What has been your business and? if in the employ of any firms, please state what firms and for how long a time.

4. Is it a part of your business to deal in spool cotton; and, if so, for how long have you been accustomed to buy and sell spool cotton?

5. In whose make of spool cotton have you dealt, if in any, either on your own account or for your employers?

6. If you have dealt in Coats' spool cotton, for how long a time have you dealt in it, and are you familiar with the labels and spool heads of the Coats thread?

7. Have you dealt in or are you familiar with the thread
403 known as Merrick thread, that made by the Merrick Thread Company; and, if so, for how long have you dealt in it or

been familiar with it, and are you familiar with the Merrick spool heads and labels?

8. Has any person ever called on you and tried to induce you or your firm to purchase Merrick thread; and, if so, when, where, and what was his name?

9. If you answer question 8 in the affirmative, state whether said person made any representations as to his being an agent for the thread made by the Merrick Thread Company; and, if he did, state fully what those representations were.

10. Was Merrick thread offered to you by said person at the same price as the corresponding numbers of Coats' thread or at a different price, and, if the latter, was it offered to you at a lower or higher; and, if so, how much lower or higher?

11. State whether any such person at any time held out to you or your firm any inducement to deal in Merrick thread; and, if so, what inducement.

12. State whether such person at any interview or interviews with you pointed out any similarity or dissimilarity in appearance between the spool heads and labels of the Merrick thread and the Coats thread.

13. If you answer yes to question 12, state the time and place of any such interview, the name of said person, and whatever was said and done by him in pointing out such similarity or dissimilarity in appearance between the spools heads and labels of the Merrick thread and the Coats thread.

14. State whether said person produced sample spools of Merrick thread at said interview, and whether he compared them with the Coats' spools in your presence, and what, if anything, he said as to similarity or dissimilarity of the spool heads and labels on both, and as to customers taking one for the other.

15. State whether or not said person urged you to purchase Merrick's thread on account of the similarity in appearance between the Merrick spools and Coats' spools; and, if so, what did he say?

16. Do you know or can you set forth any other matter or
404 thing which may be of benefit or advantage to the complainants in this suit of which may be material to the subject of this your examination? If yes, please set forth the same fully and at large in your answer.

United States Circuit Court, Southern District of New York. In Equity.

COATS *et al.*
vs.
THE MERRICK THREAD COMPANY *et al.*

Cross-interrogatories to be addressed to Frederick Smith, of Burlington, Kansas, on the part of the defendants herein.

1 X Q. State your successive employments previous to your occupation with your present employers, giving the place and length of time employed and the names of your employers for the five years

previous to entering upon your present employment, as fully as you can remember.

2 X Q. How long have you been in your present employment?

3 X Q. If you answer Q. 8 in the affirmative, state the name of the house in whose employ you were at the time, what was at that time the business of said firm, and what did they sell principally.

4 X Q. Was their business a grocery business or a dry-goods business, or both, and which chiefly?

5 X Q. Were they selling or had they sold the Merrick Thread Company's thread at the time?

405 6 X Q. Had they sold it previous to the time referred to?

7 X Q. What threads had they sold? Name them all, so far as you know.

8 X Q. How much of each kind were they selling per month, as nearly as you can tell?

9 X Q. If you say that you have dealt in Coats' spool cotton, please state to what extent, how much you have bought, and how much you have sold, as near as you can estimate it, and whether at retail or wholesale, and where and when.

10 X Q. If you say that any person ever called upon you to induce you or your firm to purchase Merrick thread, state the firm or the person or persons he claimed to represent.

11 X Q. What, if anything, did he say or do leading you to suppose that he represented the Merrick Thread Co. or anybody in any way connected with said company?

12 X Q. State as particularly as it is possible for you to do all the details which lead you to suppose he represented the Merrick Thread Co. or anybody in any way connected with said company.

13 X Q. What personal knowledge have you of his connection in any way with the Merrick Co. or any other concern or person?

14 X Q. The defendant The Merrick Thread Co. wishes to identify the person who, as you may say, tried to induce you to buy Merrick thread of him, or who, as you may say, made representations as to being agent or having some connection with said company, or who, as you may say, pointed out or referred to any similarity between the Merrick thread and Coats' thread. Will you, therefore, give his name, his then address, his present address, describe his appearance as nearly as you can remember it, and particularly his apparent age, his height, complexion, color of hair, whether he wore a beard or moustache, and state any circumstance, appearance, resemblance, characteristic, or any other thing whatsoever which you can recall that would in any way aid the defend-

406 ants in discovering who that person referred to may be, or how or where he may be found?

15 X Q. Did he show or leave with you any business card or address of any kind? If yea, describe it, or state it as fully as you can in all respects?

16 X Q. Did you see him more than once?

17 X Q. How long a time in all did you see him?

18 X Q. Where did he come from?

19 X Q. Where did he go after leaving you?

20 X Q. What, if anything, did he say as to whence he came or whither he was going?

21 X Q. What, if anything, did he say as to where his head-quarters were?

22 X Q. At what hotel or public house in Burlington did he stay?

23 X Q. Where is he now?

24 X Q. Have you ever seen him since; if so, when, where and under what circumstances? State fully.

25 X Q. Did you or your employers buy any Merrick thread of this man? If so, how much and to whom did you give the order, and from whom did you receive the thread, and will you produce and put in evidence the bill for it, and a spool of thread like that you bought, if any?

26 X Q. If you say, in answer to Q. 14, that sample spools of Merrick thread were produced by him, state how many and of what number or numbers of thread they were, and produce a spool like them.

27 X Q. Where was it that you saw this man—in what building, room, or street?

28 X Q. Who was present?

29 X Q. What was your position with the house employing you?

30 X Q. Who does the buying for the house?

31 X Q. Did you ever buy any thread of any make for the house; and, if so, what thread, and from whom did you buy it?

32 X Q. Have you received any letter or letters or written word of any kind from any one touching upon or in any way
407 connected with the subject you are testifying about? If you have, please produce them all, to be annexed to this your deposition.

33 X Q. State who has been present during the taking of this deposition besides yourself and the magistrate. State fully the name and address of any such person.

34 X Q. How did you happen to make the affidavit in this case and upon which this commission was issued? Who first spoke with you about it? Give name and address and state all that was said as fully as you can. Who afterwards spoke to you about it? Give name and address and state all that was said as fully as you can.

35 X Q. Did you see or read or hear read or have any knowledge or information whatsoever as to the contents or character of the direct or cross-interrogatories of this commission, or of any of them, before they were put to you by the examining magistrate? If yea, state fully to what extent and from whom you received such information, giving name and address and any other means of identification in your power.

36 X Q. Were you ever employed by J. & P. Coats or any agent or sub-agent of theirs in any capacity whatever?

37 X Q. Do you know of your own knowledge in whose employ the man was who, as you may say, called upon you and represented himself as agent or seller for the Merrick Thread Co.?

38 X Q. Do you know or can you set forth any matter or thing which may be of benefit or advantage to the defendants in this suit

or which may be material to the subject of this your examination? If yea, please set forth the same fully and at large in your answer to this question.

Deposition of witness produced, sworn, and examined the twenty-third day of September, in the year one thousand eight hundred and eighty-seven, at Burlington, county of Coffey, in the State of Kansas, under and by virtue of a commission issued out of the circuit court of the United States for the southern district of
408 New York in a certain cause therein depending and at issue, wherein Sir Peter Coats *et al.* are complainants and The Merrick Thread Company and Herbert F. Palmer are defendants, as follows:

FREDERICK SMITH, of the city of Burlington, county of Coffey, and the State of Kansas, aged 42 years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the complainants, doth depose and say as follows:

First. To the first interrogatory he saith:

My name is Frederick Smith; my age, 42 years; my residence is the city of Burlington, Coffey county, State of Kansas, and my occupation is clerk.

Second. To the second interrogatory he saith:

I am acting and serving as clerk for Frank Huffmans, dry-goods merchant at Burlington, Coffey Co., Kansas, and have been for nearly four years.

Third. To the third interrogatory he saith:

From April 14, 1880, I was in the employ of N. J. Wilson, of this place (Burlington, Kansas), and remained with them until January 1884, when I went to work for Sanders & Huffmans and remained with them until January 29, 1887, when Frank Huffmans succeeded the firm of Sanders & Huffmans, and have been in his employ ever since. During said time I have been clerk, and since January, 1884, clerk and buyer.

Fourth. To the fourth interrogatory he saith:

It is a part of my business to buy spool cotton and deal therein, and have bought spool cotton since 1884, and, with the exception of two years, have been accustomed to sell it ever since 1866.

Fifth. To the fifth interrogatory he saith:

I have dealt in George Clark's, John A. Clark's, Kerr's, and Coats' spool cotton.

Sixth. To the sixth interrogatory he saith:

For the last three (3) years I have principally dealt in Coats' spool cotton, but had handled it some in former years, and I am familiar with the labels on spool heads of the Coats thread.

409 Seventh. To the seventh interrogatory he saith:

I have not dealt in the Merrick thread, nor am I very familiar with that made by the Merrick Thread Company. I have seen the Merrick spool cotton and the Merrick spool heads and labels.

Eighth. To the eighth interrogatory he saith:

In the early part of the year 1886, but I cannot give the day or month, a man whose name I cannot give, but he was traveling for the Gilbert Silesia Manufacturing Company, called on me at Burlington, Kansas, and desired to sell and offered to sell me the Merrick thread. He said and represented that it was very similar to and much like the Coats' spool thread and similar to the spools and labels of the Coats' make and so similar to the Coats' thread that the difference was not easily discovered—that is, that the spools and labels were so similar to those of the Coats' make.

Ninth. To the ninth interrogatory he saith :

He did represent himself as the agent, and his statements were as given in answer eighth.

Tenth. To the tenth interrogatory he saith :

It was offered at a less rate, and I think about nine or ten per cent. less.

Eleventh. To the eleventh interrogatory he saith :

The inducement was that we could have it for less, and as the spools and labels were so nearly alike very few people could detect the difference and we could make a better profit thereon.

Twelfth. To the twelfth interrogatory he saith :

He did point out the similarity between the spool and labels of each make, as I have before stated.

Thirteenth. To the thirteenth interrogatory he saith :

I cannot state this any fuller than in eighth answer above.

Fourteenth. To the fourteenth interrogatory he saith :

The person spoken of had with him Merrick spools, and he exhibited them in comparison with Coats' spools, which I had
410 in my presence, and remarked upon their similarity and the probability of passing one for the other, as I have above stated.

Fifteenth. To the fifteenth interrogatory he saith :

He desired me to purchase, and he remarked upon the similarity, and he made the statements I have already repeated.

Sixteenth. To the sixteenth interrogatory he saith :

I do not know anything in the premises but what I have already stated.

Cross-examination :

First. To the first cross interrogatory he saith :

In April, 1880, I went to work for W. J. Wilson as clerk in his dry goods store, in Burlington, Kansas, and remained in his employ until January 1, 1884, when I went to work for the firm of Sanders & Huffmans, consisting of W. J. Sanders and Frank Huffmans, and remained with them until January 29, 1887, when Mr. Sanders retired from the firm, and since that time I had been in the employ of said Frank Huffmans.

Second. To the second cross-interrogatory he saith :

Going on four years, as just stated in my last answer.

Third. To the third cross-interrogatory he saith :

I was then in the employ of Sanders & Huffmans, at Burlington,

Kansas. Their business there was a general store. They kept, among other things, dry goods, boots and shoes, hats and caps, and quinine, and groceries.

Fourth. To the fourth cross-interrogatory he saith:

It was both, as above stated, and made no specialty in any one line; sold according to the wants of customers.

Fifth. To the fifth cross-interrogtory he saith:

No.

Sixth. To the sixth cross-interrogatory he saith:

No.

Seventh. To the seventh cross-interrogatory he saith:

Coats', Clark's, and Kerr's.

Eighth. To eighth cross-interrogatory he saith:

I cannot tell.

411 Ninth. To the ninth cross-interrogatory he saith:

During all the time I was with Sanders & Huffmans and with Frank Huffmans, as above stated, I sold Coats' thread, and that principally. During the time I was with Sanders & Huffmans I handled Coats' thread principally at retail. Since January 1, 1887, I have handled Coats' thread exclusively, and both at wholesale and retail, and at Burlington, Kansas, and have since January 1, 1887, sold about fifteen hundred dozen spools.

Tenth. To the tenth cross-interrogatory he saith:

He claimed to represent the Gilbert Silesia Manufacturing Company.

Eleventh. To the eleventh cross-interrogatory he saith:

He carried samples of this thread and wanted to sell and said he represented that company.

Twelfth. To twelfth — interrogatory he saith:

His trying to sell that thread and arguing the advantages to us in dealing in it.

Thirteenth. To the thirteenth cross-interrogatory he saith:

None whatever.

Fourteenth. To the fourteenth cross-interrogatory he saith:

I cannot give his name or address. He was of middle age, rather short, stout built rather than slender; a good talker; don't remember as to hair or beard.

Fifteenth. To the fifteenth cross-interrogatory he saith:

He did not.

Sixteenth. To the sixteenth — interrogatory he saith:

I did not.

Seventeenth. To the seventeenth cross-interrogatory he saith:

Perhaps an hour or hour and a half.

Eighteenth. To the eighteenth cross-interrogatory he saith:

Do not know.

Nineteenth. To the nineteenth cross-interrogatory he saith:

Do not know.

412 Twentieth. To the twentieth cross-interrogatory he saith:

Don't remember as he stated.

Twenty-first. To the twenty-first cross-interrogatory he saith:

Think he stated, but — remember where.

Twenty-second. To the twenty-second cross-interrogatory he saith: Do not know.

Twenty-third. To the twenty-third cross-interrogatory he saith: Do not know.

Twenty-fourth. To the twenty-fourth cross-interrogatory he saith: I have not, to my recollection.

Twenty-fifth. To the twenty-fifth cross-interrogatory he saith: Did not buy any.

Twenty-sixth. To the twenty-sixth cross-interrogatory he saith: He had several sample spools, but how many I cannot state nor can I state the numbers. As I did not buy any and have none, I cannot produce any.

Twenty-seventh. To the twenty-seventh cross-interrogatory he saith:

I saw the man at store of Sanders & Huffmans, on Neosh street, Burlington, Kansas.

Twenty-eighth. To the twenty-eighth cross-interrogatory he saith: Do not remember.

Twenty-ninth. To the twenty-ninth cross-interrogatory he saith: I was their clerk and buyer.

Thirtieth. To the thirtieth cross-interrogatory he saith:

I do upon dry goods, boots and shoes, hats and caps.

Thirty-first. To the thirty-first cross-interrogatory he saith:

I have bought Coates', Clark's, and Kerr's; have bought of traveling men for the house—from Charles Purell, with H. T.
413 Simon, Gregory & Co., of St. Louis, Mo.; Thomas Corbitt, with Rice, Stix & Co., of St. Louis, Mo.; of C. H. Cleveland, of Burlington, Kansas; John A. Clark's agent; also of Kerr's agent; Mr. Skipwith, Coats' agent, and have ordered by mail direct.

Thirty-second. To the thirty-second cross-interrogatory he saith:

I received one letter from Auchincloss Brothers, of New York city, simply informing me that J. Jay Buck, of Emporia, had been and would be appointed commissioner to take my testimony in this case, but the letter said nothing about the merits of this case nor concerning the purport of my testimony, and that letter is misplaced, lost, or destroyed, and I cannot, after diligent search, find it to produce it.

Thirty-third. To the thirty-third cross-interrogatory he saith:

No one present except myself and the commissioner. Last year Mr. Skipwith, agent for the Coats' thread, called on me, and while our conversation ran on different kinds of thread I chanced to tell him of the person who wanted to sell me the Merrick thread, and subsequently he called on me again with the affidavit prepared. I think Mr. Skipwith's headquarters are in Missouri. I told him of the facts as I have stated them here. I never saw or read any of the direct or cross interrogatories until this day, when they were read to me by examining magistrate.

Thirty-fourth. To the thirty-fourth cross-interrogatory he saith:

Last year Mr. Skipwith, agent of the Coats' thread, called on me, and while our conversation run on different kinds of thread I chanced to tell him of the person who wanted to sell me the Mer-

rick thread, and subsequently he called on me again with the affidavit prepared. I think Mr. Skipwith's headquarters are in Missouri. I told him of the facts as I have stated them here.

Thirty-fifth. To the thirty-fifth cross-interrogatory he saith:

414 I never saw or read any of the direct or cross interrogatories until this day, when they were read to me by the examining magistrate.

Thirty-sixth. To the thirty-sixth cross-interrogatory he saith:

No.

Thirty-seventh. To the thirty-seventh cross-interrogatory he saith:

I only know as above stated.

Thirty-eighth. To the thirty-eighth cross-interrogatory he saith:

I do not.

And further deponent saith not.

FREDERICK SMITH.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 23d day of September, A. D. 1887, before J. Jay Buck, commissioner.

415 STATE OF KANSAS, } *ss:*
County of Coffey, }

—, J. Jay Buck, commissioner appointed herein and commissioner of the United States circuit court for the district of Kansas, do certify that Frederick Smith, the witness, personally appeared before me on the 23d day of September, A. D. 1887, at two o'clock in the afternoon, at the city of Burlington, in Coffey county, in the State of Kansas, and, after being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the answers that shall be given by him to the interrogatories proposed to him shall be the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition and did in my presence subscribe the same; and — further certify that I have subscribed my name to each half sheet thereof; and I further certify that no one appeared in behalf of the complainants, and that no one appeared in behalf of the defendants.

J. JAY BUCK, [SEAL.]
United States Commissioner for the District of Kansas.

I have no seal.
My fees, $14.50, and privilege.

J. JAY BUCK,
Commissioner.

416 *Depositions De Bene Esse.*

Circuit Court of the United States for the Southern District of New York.

Sir PETER COATS *et al.*, Complainants,
against
THE MERRICK THREAD COMPANY *et al.*, Defendants. } In Equity.

Depositions for final hearing, taken *de bene esse*, on the part of the complainants herein under, pursuant to and in accordance with the statutes of the United States in such case made and provided and in pursuance of the rules and practice of this court, before Abbot E. Smith, a notary public in and for the county of Wabasha and State of Minnesota.

STATE OF MINNESOTA, } *ss:*
County of Wabasha, }

JANUARY 12TH, 1888—10 o'clock a. m.

Met at the office of C. F. Young & Brother, in the city of Lake City, Minn., pursuant to the notice hereunto annexed, with the acknowledgment thereupon of due and timely service thereof on the defendants herein.

There was present R. H. Moore, of counsel for complainants, who represented the complainants herein.

There was no appearance on the part of the defendants herein.

417 At the time and place named in said notice HENRY A. YOUNG, a witness of lawful age, produced on the part of the complainants herein, having been by me first duly sworn and cautioned to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being thereafter carefully examined by R. H. MOORE, of counsel for complainants, deposes and says under oath as follows, to wit:

1 Q. What is your name, age, residence, and occupation?

A. My name is Henry A. Young; I am forty-one (41) years of age; I reside in the city of Lake City, in the county of Wabasha and State of Minnesota; I am a member of the firm of C. F. Young & Brother, dry-goods merchants, doing business as such in said city of Lake City, Wabasha county, State of Minnesota, and I am the manager of said firm.

On the suggestion of the complainants' counsel, R. H. Moore, that the further examination of said witness, Henry A. Young, and of all the other witnesses to be examined on the part of the complainants might, in courtesy, better be postponed until the defendants' solicitors might have further time to appear and cross-examine said witnesses, and there being no appearance on the part of the defendants herein at the time and place named in said notice hereunto annexed, I do hereby adjourn this examination and the taking of

depositions as named and stated in said notice until to-morrow morning, the thirteenth (13th) day of January, A. D. 1888, at 10 o'clock a. m., when the examination will be resumed at the place named in said notice hereunto annexed.

Witness my hand and official seal this January 12th, A. D. 1888.

ABBOT E. SMITH,
[SEAL.] *Notary Public, Wabasha Co., Minn.*

418 JANUARY 13TH, 1888—10 o'clock a. m.

STATE OF MINNESOTA, } ss:
County of Wabasha, }

At the office of C. F. Young & Brother, in the city of Lake City, Minn., at 10 o'clock a. m., January 13th, 1888, to wit, at the time and place as named and specified in the notice hereunto annexed and in the adjournment made pursuant thereto, met pursuant to said adjournment.

There was present R. H. Moore, of counsel for complainants, who represented the complainants herein.

There was no appearance on the part of the defendants herein.

At the time and place above specified as pursuant to said adjournment the examination of the witness HENRY A. YOUNG by R. H. MOORE, of counsel for complainants, was resumed, and said witness, Henry A. Young, having been duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, deposes and testifies under oath as follows, to wit:

2 Q. State the names of the persons composing the firm of C. F. Young & Brothers.

A. "C. F. Young, Henry A. Young, and Chas. A. Koch."

3 Q. State whether or not you are actively engaged in managing the affairs of your said firm.

A. "I am the managing partner of the firm, particularly as to buying and selling. C. F. Young is absent most of the time, and Chas. H. Koch manages chiefly as credit man and as to office affairs."

On the suggestion of R. H. Moore, the complainants' counsel, that the further examination of said witness, Henry A. Young, and of all the other witnesses to be examined on the part of the complainants might, out of courtesy, better be postponed until the defendants' solicitors might have further time to appear and cross-examine said witnesses—the trains being very much delayed by the severe snow-
storm of yesterday and their being no appearance on the part
419 of the defendants herein, although complainants' counsel had been notified that the defendants' solicitor would be present this morning—I do therefore hereby adjourn this examination and taking of depositions as named and stated in said notice hereunto annexed (which was yesterday duly adjourned until this morning) until to-morrow morning, the fourteenth (14) day of January, A. D. 1888, at 10 o'clock a. m., when the examination will

be resumed at the place named in said notice, to wit, at the office of C. F. Young & Brother, Lake City, Minnesota.

Witness my hand and official seal this January 13th, A. D. 1888.

ABBOT E. SMITH,
Notary Public, Wabasha Co., Minn. [SEAL.]

STATE OF MINNESOTA, } ss :
County of Wabasha, }

JANUARY 14TH, 1888—10 o'clock a m.

Pursuant to adjournment made yesterday, which was pursuant to adjournment made the day before, which was pursuant to notice hereunto annexed, met at the office of C. F. Young & Brother, at 10 o'clock a. m., on January 14th, 1888, Lake City, Wabasha Co., Minn.

Present: R. H. Moore, counsel for complainant; no appearance on the part of the defendants.

HENRY A. YOUNG, being recalled, upon his oath resumed his testimony as follows:

4 Q. Do you recognize the newspaper now handed to you? If so, state what it is.

A. I do. It is the "Graphic Sentinel," published at Lake City, Minnesota, on the 15th day of November, A. D. 1887.

5 Q. Do you recognize any advertisement in that paper that your firm caused to be inserted therein in regard to frauds on J. & P. Coats' thread?

420 A. I do; on the last page, the heading of which advertisement is "Beware of fraud."

Said newspaper is offered in evidence and is marked as "Complainants' Exhibit A."

6 Q. Can you detail any circumstances which led you to insert that advertisement in said newspaper?

Objected to as hearsay by defendants' counsel.

A. We sell Coats' thread extensively and we inserted that notice for our own protection. A German customer called at the store one day and said her daughter was very particular to have her get Coats' thread and no other kind, since the last kind of thread which she got in another store which looked like Coats' was not satisfactory.

7 Q. Can you state what kind of thread as an imitation of Coats' thread you had in view at the time when your firm inserted that advertisement?

A. Merrick's thread.

8 Q. Is there any similarity in the general appearance of the spools and labels on Merrick's thread with the general appearance of the spools and labels on Coats' thread?

A. The general appearance of both is very similar; unless a person compared them side by side he would be very apt to be deceived.

9 Q. Have you in your business noticed any result from said advertisement?

A. I think it has made a difference. A number of our lady customers have referred to it, and I think they are more cautious now in buying thread.

10 Q. What is the leading thread sold in this city and vicinity?

A. J. & P. Coats' thread. I do not think that there have been over two hundred dozen spools sold of all the other machine thread combined outside of said Coats' thread since the year A. D. 1882.

11 Q. Have you within the last six months had any solicitation to buy and handle in your business said Merrick's thread?

421 A. Yes; an agent called upon us last fall from the Merrick Thread Company, and he spoke to both Mr. Chas. A. Koch and myself, asking us to buy said Merrick's thread.

12 Q. What, if any, representations were made to you by that agent?

A. I did not hear all that he said to my partner, Mr. Koch, as I was busy, but he highly recommended the Merrick thread and urged us to handle it; then I left him talking with my partner, Mr. Koch; this was at our store, in Lake City.

13 Q. Is there any difference in the price at which said Coats' thread and said Merrick's thread is offered for sale to the trade?

A. We have been offered one hundred (100) dozen of Merrick's thread at the same rate per dozen as we have to pay for Coats' thread if we buy said Coats' thread in lots of two thousand (2,000) dozen or more—that is to say, we can buy small lots of Merrick's thread at the price which we have to pay for Coats' thread in large lots. On comparing the terms offered by this Merrick Company I find a mere fractional difference—very small—in their discounts as compared with the Coats Company's discounts.

14 Q. Have you any reason to suppose, from your experience, that the Merrick thread could be sold in this vicinity unless it bore a close resemblance to said Coats' thread?

A. The Coats' thread has obtained a very strong footing here, and I am sure that Merrick's thread could not be sold in Lake City unless it did resemble the Coats' thread as to spools and labels. Undoubtedly we could pass off on our customers a large quantity of any other make of thread if only it was made to resemble Coats' thread in general appearance.

15 Q. How long have you been engaged in the dry-goods business?

A. Over twenty-three (23) years.

On reading over the above depositions to said witness,

422 Henry A. Young, he wished, on reflection, to explain his answer to question No. 13, and he makes the following explanation under oath, namely:

"We can buy one hundred dozen of Merrick's thread, and on payment for the same within thirty days we can get a discount of ten per cent. and five per cent. at that time, while on the Coats' thread, on payment for the same within thirty days, we get a discount of

only six (6) per cent., and in case we buy one thousand dozen within six months or two thousand dozen within one year we in such case get a further discount or bonus of nine per cent. at the end of such time, but if we fall short by one dozen of those last-named quantities we forfeit said nine per cent."

HENRY A. YOUNG.

HENRY A. YOUNG, the witness, being recalled for cross-examination, on oath, being cross-questioned by Mr. WITTER, of counsel for defendants, testifies as follows, to wit:

16 X Q. I hand you a copy of the "Graphic Sentinel," dated December 27, 1887. State whether you find in that paper an advertisement at the bottom of the last column of the page marked page 5 in ink, said advertisement reading as follows: "Beware of frauds on J. & P. Coats' best six-cord thread, white, black, and colors, for hand and machine. When buying this thread see that J. & P. Coats' name is stamped on every spool," said reading matter being accompanied by two cuts showing each a spool of thread with the following appearing on the displayed end of the spool: On the wooden part of the spool a design consisting of the number 50 in figures with cross-lines and stars between the figures, and within this design the words "J. & P. Coats' best six-cord" in a circle, and within the circle the letters and figures "200 yds., 50"?

A. Yes, sir; I do.

423 17 X Q. "The Graphic Sentinel" is a newspaper published in this city, is it not?

A. Yes, sir.

18 X Q. Where did the electrotype plates come from from which the two cuts of spools forming part of that advertisement were made?

Objection by complainants' counsel that this is not proper cross-examination, not relating to any subject referred to in the direct examination, and as to this question the witness must be considered the witness of the defendants if the examination is pursued in reference to this particular advertisement.

A. From J. & P. Coats—that is, from Auchincloss Brothers.

19 X Q. When exactly did you receive them from Auchincloss Brothers?

A. I think it was the last part of November.

Defendants' counsel offers the said paper in evidence, and it is marked "Defendants' Lake City Exhibit No. 3, A. E. S., notary," subject to the above ojection.

20 X Q. Your firm keeps copies of its business letters, does it not?

A. Of the most of them; not all of them.

21 X Q. You had some correspondence with Auchincloss Brothers touching the two advertisements in "The Graphic Sentinel" as shown in the two exhibits of that paper, dated November 15th, 1887, and December 27th, 1887, did you not?

Same objection as above.

A. Yes, sir; we had a correspondence regarding the advertisement of November fifteenth, but I did not write it and I dou't know what it was; my partner, Mr. Koch, wrote it.

424 22 X Q. Will you now go to your store and examine your books and files and bring to this office copies of any letters which you or Mr. Koch or your firm has written to Auchincloss Brothers in which there is any mention of or reference to either of these advertisements or in reference to your firm procuring evidence for Auchincloss Brothers or in any way referring to this controversy or the Merrick thread?

Complainants object that the private correspondence of C. F. Young & Brothers is immaterial and incompetent in the matter of this controversy.

A. I will go if you gentlemen wish me. I did not write any of them myself. I don't think it was all Mr. Koch's.

The magistrate is requested to go with the witness in search for these letters.

The witness goes to his office and returns and reports that he has examined his letter book and does not find any such letter.

23 X Q. If the Merrick spools did not have the number stamped in the wood, do you think there would be any likelihood of their being mistaken for Coats' by anybody?

Objected to as not proper cross-examination, incompetent, and immaterial.

A. Well, I think that makes it look more like Coats' thread than any other I have seen.

24 X Q. By the others that you have seen you refer, do you not, to the Clark's O. N. T., the Clark's Mile-end, the Willimantic on white spools, the Orrs & McNaught, Keer's, and others as they appear in Defendants' Exhibit No. 48?

A. Yes, sir; as they appear in that box. It is the first time I have seen some of these threads.

425 25 X Q. The only thread you have been to any extent familiar with has been the Coats', has it not?

A. Yes, sir.

26 X Q. When you took part in inserting the "fraud" advertisement in the "Sentinel" you thought the Merrick Company had no right to put those numbers in the wood of their spools. Is that so?

Same objections.

A. I was under that impression.

27 X Q. And that is why you tried to protect yourself against this rival of the Coats' thread, is it not?

A. Yes.

28 X Q. The numbers in the wood of Merrick's spools and of

Coats' spools describes the number or size of the thread on the spools, does it not?

A. It does.

29 X Q. And these wooden numbers remain after the label or the number on the label is lost or defaced. Is not that so?

Same objections.

A. They do; yes, sir.

30 X Q. And they are useful for that reason, are they not?

Same objections.

A. They are, in my judgment.

31 X Q. Since the numbers in the wood appear several times it becomes more convenient to learn the number of the size of the thread and this whether the label itself is present or absent. Is not that so?

A. Yes; that is so.

32 X Q. Do you think it is an easy matter to introduce a new brand of spool thread upon the market?

A. It is not; it is very difficult.

33 X Q. And if a salesman could claim the advantages for
426 a new thread resulting from being the number of the thread permanently appearing several times in the wood of the spool that would help the salesman to sell the new thread, would it not?

A. I think it would.

34 X Q. Except for the wooden numbers on the Merrick and Coats spools, any other of the six-cord makes with black and gold labels wound on white spools would look as much like Coats' as Merrick's does, would they not?

A. Yes; I think they would.

35 X Q. And if you had not found wooden numbers on the Merrick spools and had not been dealing in Coats' thread exclusively you would not have thought to publish the "Sentinel" advertisements, would you?

A. I think not.

36 X Q. All the white spools of six-cord thread having a black and gold label and appearing in Defendants' Exhibit No. 48 have a general resemblance to each other, do they not?

A. They do, as I see in this case exhibit.

37 X Q. You say "as I see in this case exhibit" for the reason that you have for the first time now seen most of these six-cord black and gold label threads. Is that so?

A. Yes, sir; I hadn't hardly seen any of them white spools with black and gold labels before.

38 X Q. What dealers in Lake City did Gardner and Carpenter and Dempster visit at the suggestion of Auchincloss Brothers and your firm to ask for Coats' thread and get Merrick's?

A. I did not send those parties. I only know who they are second handed.

39 X Q. From whom?

A. From Mr. Koch.

40 X Q. Give every name of a dealer or dealers so learned by you from Mr. Koch, your partner, or from any other source.

A. It was Seileg & Buck and, I believe, Anderson Brothers.

41 X Q. And no others?

A. I could not say.

427 42 X Q. Have you heard the name of any other firm from whom Gardner or Carpenter or Dempster bought Merrick's thread at the suggestion of your house or of Auchincloss Brothers whose name you can remember?

A. I cannot remember any other, as I have left the whole matter to Mr. Koch.

43 X Q. You once dealt in the thread called Clark's C. S. I., did you not?

A. Yes, sir.

44 X Q. Do you recognize some spools of that thread in Defendants' Exhibit No. 48?

A. Yes, sir.

45 X Q. When (about) did you cease to sell that Clark's C. S. I. thread and begin to sell the Coats' in place of it?

A. About the spring of 1882.

46 X Q. The fire took place then?

A. In April of that year.

47 X Q. How long did you sell Clark's C. S. I. thread?

A. I should think about four or five years, but then we kept some Coats' besides.

48 X Q. What do you understand "best six-cord" to mean?

Objected to as incompetent and irrelevant by complainants' counsel.

A. Machine thread. I do not know anything about the strands; we simply buy it as a machine thread, and three-cord thread we buy as basting cotton.

49 X Q. Which costs the most, the three-cord or the six-cord?

A. The six-cord.

50 X Q. About twice as much, don't it?

A. Yes; fully.

Examination adjourned till one o'clock for dinner, to meet at that time at the office of Abbott E. Smith aforesaid.

ABBOT E. SMITH. [SEAL.]
Notary Public, Wabasha Co., Minn.

428 Met at 1 o'clock pursuant to above adjournment, and the cross-examination of HENRY A. YOUNG by Mr. WITTER, defendants' counsel, is resumed as follows:

51 X Q. You understand that six-cord thread is made of six cords and three cord thread of three cords, do you not?

Objected to as incompetent and irrelevant.

A. Well, that's the way I thought it was.

52 X Q. And you understand that all the 200-yard thread of J. & P. Coats is six-cords, do you not?

Same objections.

A. I am under that impression, but I never examined into the matter.

53 X Q. What is the highest number of Coats' six-cord thread that you now have on hand?

Same objections.

A. Number 130.

54 X Q. And you also have number 120 and number 110, have you?

Same objections.

A. Yes, sir.

55 X Q. Did you ever notice any difference in the reading matter on the black and gold label of your numbers of Coats' 110, 120, and 130 from the reading matter on the black and gold labels of the lower numbers, 100, 90, &c.?

Same objections.

A. I have not. In fact I never looked.

429 56 X Q. You always keep some of these five numbers on hand, don't you?

Same objections.

A. We always mean to have those numbers up to about 130.

57 X Q. How many years do you say you have sold this Coats' six-cord thread at retail to those that use it?

A. Well, ever since I have been in the business; for over twenty years; well, over twenty-three years.

58 X Q. By what designation has it been asked for all these years?

A. Coats' thread.

59 X Q. Did you ever hear it called for by any other name or description?

A. No; we have *have* had only Coats' thread for a good many years and this is generally known here, and so customers sometimes simply ask for thread or machine thread.

60 X Q. The Coats' thread is sold and used for sewing by hand as well as by machine, and is so described on the dozen boxes; is not that so?

Objected to by complainants' counsel as incompetent and irrelevant.

A. Yes, sir; that is so.

61 X Q. The "Graphic Sentinel" of Lake City is a weekly newspaper, is it not?

A. Yes, sir.

62 X Q. Was the advertisement that you referred to on your

direct examination printed in more than one issue, to wit, that of November 15th, 1887?

A. I think it was only once.

63 X Q. If you had seen and understood all the spools of thread that you now have you would not have inserted that advertisement, would you?

A. Well, if I had known then what I know now I wouldn't have done it, surely.

430 64 X Q. You have boxes of Coats' six-cord 200-yds. thread now in your store upon the inside flap of which the thread is described as six-cord from 8 to 200 in white and black, have you not?

Objected to as incompetent and immaterial.

A. Yes, sir; I saw them Saturday.

65 X Q. And there were empty boxes with flaps bearing the same descriptive matter; is not that so?

A. Yes.

66 X Q. Why are you anxious to sell two thousand dozen of Coats' thread in a year or one thousand in six months?

Same objection.

A. Because we get a bonus if we sell a thousand dozen in six months or two thousand dozen in a year.

67 X Q. And the bonus for two thousand dozen is pretty near one hundred dollars, is it not?

Same objections.

A. Yes; it is over ninety dollars. It is nine per cent. upon fifty-five cents less six per cent.

68 X Q. How many clerks do you keep?

A. Seven; besides ourselves six to eight.

69 X Q. In answer to question 6 you speak of a German customer calling at your store and saying something about her daughter's being particular to have Coats' thread, &c. Did this customer deal with you personally on that occasion?

A. She did not.

70 X Q. With whom, then?

A. With two of our clerks, I believe; with one at least.

71 X Q. Did you ever give any instructions to Gardner, Carpenter, or Dempster yourself or was it your partner, Mr. Koch, who gave the instructions to go out and ask for Coats' thread with the purpose of getting Merrick's?

A. Mr. Koch.

431 72 X Q. What other dealers or firms in this city sell spool thread besides C. F. Young & Brother, Anderson Bros., and Seely & Buck?

A. M. O. Hemp, Raymond Heinich, Charles Hanswedell; all these parties we have sold Coats' thread to including Anderson Bros. and Seely & Buck.

73 X Q. And if these dealers should deal in Merrick's thread in-

stead of Coats' you would sell considerably less Coats' thread, would you not, in six months or a year?

A. I think it would make some difference to our trade; yes, sir.

74 X Q. And some of these dealers are beginning to sell Merrick's thread, are they not?

Objected to as incompetent and immaterial.

A. They are; yes, sir. I wish to add to my former answer to question 72 that I think Seely & Buck get some thread elsewhere; at least we are selling them less than recently.

75 X Q. The agent of the Merrick Thread Company, to whom you refer in your answers to questions 11 and 12, was Mr. H. Phillips, here present, was it not?

A. Yes, sir.

76 X Q. Mr. Phillips tested the strength of the Merrick and the Coats thread in your presence, did he not?

A. He did.

77 X Q. And the result of those tests showed the Merrick thread to be the stronger? Is not that the fact?

Objected to as incompetent, irrelevant, and immaterial.

A. Yes; so far as I could see.

78 X Q. Mr. Phillips tested the superiority of the Merrick thread over the Coats in three different ways, did he not?

Same objections.

432 A. Two ways, I remember; there may have been three.

79 X Q. Describe them.

Same objections.

A. One method was by the use of a little weighing machine called a "thread-tester." Each kind of thread, Coats' and Merrick's, of the same number was tried upon this tester to see which one when it broke left the indicator on the tester at a point indicating the higher number of pounds.

The other tests that I remember was to lock two pieces of thread of the same number together, one piece of Merrick's and one of Coats', and I took hold of one thread while Mr. Phillips took hold of the other, and then we pulled until one of the two threads gave way.

80 X Q. And the result of both these tests was that the Coats' pulled less and broke first, was it not?

Same objections.

A. Yes.

81 X Q. And at that time you also yourself made the test with the testing machine, did you not, and with the result that the Coats' thread pulled less on the tester?

Same objections.

A. I think so.

82 X Q. From whom or through whom did you purchase your Clark's C. S. I. thread?

Same objections.

A. We started to buy of A. T. Stewart & Co., who had a branch establishment in Chicago.

83 X Q. At the time when this Merrick Thread Company's
433 agent, Mr. Phillips, solicited you and your partner to buy and become a dealer in the Merrick thread he urged its merits upon you strongly as a thread equal to if not superior to the Coats and offered it to you at a lower price than the Coats; is not that so?

A. Yes; that is so. I have before explained how much less.

84 X Q. As a result, however, of the interview, you declined to buy or deal in the Merrick thread; is not that so?

A. Yes; at that time.

85 X Q. Did you say anything at that time to Mr. Phillips as to the Merrick's thread being a fraud on Coats, or did Mr. Koch, so far as you know, say anything of that kind at that time?

A. Not that I know of; in fact, I know I didn't for myself. I think Mr. Phillips' call at our store was not a great while before the fifteenth of November.

86 X Q. You told Mr. Phillips that perhaps at some future time you might deal in the Merrick thread, did you not?

A. I think I did.

87 X Q. Mr. Phillips had with him in your presence boxes and spools of the Merrick thread referred to, did he not?

A. He did.

88 X Q. Now, the main reason why you didn't buy the Merrick thread was because you had been long dealing in Coats' thread and because you desired to sell two thousand dozen of it in a year and so get, the bonus, and because your sales in a year run pretty close to about two thousand dozen of Coats' thread; is not that just the truth?

A. The first two portions of the question are certainly true; the last part of the question I am not so sure about, except for this year; this year we have sold only a very little above two thousand dozens.

89 X Q. As an additional reason for declining to buy and sell the Merrick thread you stated to Mr. Phillips, did you not, that it was close to the end of the year, which would be a very bad time
434 to introduce a new thread along with your Coats', because it would endanger your getting the bonus from Coats?

A. I think that I used language similar to that; perhaps not quite so strong as to "endanger" part, but we wanted to get all the bonus we could get.

90 X Q. And finally you told Mr. Phillips to go and sell his Merrick thread to the other dealers in town, and said that perhaps later you might become his customer; is not that the truth?

A. Yes.

Redirect examination of said witness, HENRY A. YOUNG, by R. H. MOORE, of counsel for complainants:

91 Q. As far as you know, has the Coats thread given satisfaction to the people in this community who use it?

A. As far as I know, it has given the best of satisfaction.

91 Q. There was then no reason on that score for your firm to entertain any desire to change the brand of thread they were handling when Mr. Phillips called, was there?

A. No, sir; no reason on that score.

93 *X* Q. Calling your attention to cross-question 72, I wish to know whether there are not other dry-goods merchants in Lake City other than those whose names you have given?

A. There are four others dealing in dry goods, namely, G. W. Thomas, A. L. Deutsch, C. E. Finch, and P. M. McInerney.

94 Q. What did you mean in responding to cross-question 63 when you stated that if you had known what you know now you would not have published the notice on the fifteenth of November in the "Graphic Sentinel"?

A. I don't want to be a witness nor to be involved in any lawsuit; I didn't suppose I was getting into any trouble and I hadn't seen these other makes of thread, or at least put any particular
435 attention to them—that is, the Clark's O. N. T., the Willimantic on white spools, the Orr's & McNaught, and others that may have gold and blue labels.

95 Q. What is your best recollection as to the manner in which the complaint of the German lady referred to in your direct examination came to your knowledge?

A. I think it came to me through one of my clerks. He either pointed to the lady or else mentioned it shortly after she went out of the store, and I immediately prepared the advertisement; wrote it out myself; and this must have been a day or a few days before the fifteenth of November.

Recross-examination of said witness, HENRY A. YOUNG, by Mr. WITTER:

96 Re-X Q. When was it that you sent a copy of the "Graphic Sentinel" of November 15th, 1887, to Auchincloss Brothers; how soon after it was published on the fifteenth?

Objected to by complainants' counsel as immaterial.

A. I don't remember exactly. I think Mr. Koch will remember better. I think he is the one that sent it. I knew of its being sent, and it was pretty soon after it was published.

HENRY A. YOUNG.

Subscribed and sworn to before me this 16th day of November, A. D. 1888.

ABBOT E. SMITH,
[SEAL.] *Notary Public, Wabasha Co., Minn.*

436 CHAS. A. KOCH, a witness of lawful age, produced on the part of the complainants herein, having been by me first duly sworn and cautioned to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being carefully examined by R. H. MOORE, of counsel for complainants, deposes and says, under oath, as follows, to wit:

1 Q. What is your name, age, residence, and occupation?

A. My name is Chas. A. Koch. I am twenty-seven years (about) of age. I reside at Lake City, Minnesota, and am a member of the firm of C. P. Young & Brother, dry-goods merchants.

2 Q. Were you aware of the advertisement in the "Graphic Sentinel" which was referred to by Mr. Young?

A. I was.

At this point the defendants' counsel, W. C. Witter, of New York city, appeared, having been delayed by the severe storm and weather heretofore alluded to, which made it impossible for him to reach the place of examination sooner.

The examination of witnesses up to the present point having been proceeded with in good faith and on the supposition that defendants' counsel has concluded not to be present, the examination of said witnesses is not objected to on that account.

The testimony of said witness, Henry A. Young, as well as of the witness Chas. A. Koch, is seasonably objected to as not in rebuttal, and is further objected to as making out a new *prima facie* case, and also as incompetent.

3 Q. Did your firm cause any person or persons to visit any other dry-goods establishment in this vicinity for the purpose of buying spools of thread? If so, state what instructions, if any, were given to such person.

437 A. Yes. The instructions were that they should call for Coats' thread only, but take whatever was given, unless they should be told that the thread offered was not Coats' thread.

4 Q. Will you give the names of those persons so sent?

A. G. Ford Carpenter and Wm. Gardner.

5 Q. In consequence of those instructions were any spools of thread brought to you?

A. There were.

6 Q. Will you produce all those spools that were so brought to you?

Witness produces a box of thirty-two (32) spools of thread. This box of spools was offered in evidence and is marked as "Complainants' Exhibit B."

7 Q. Were all those spools brought to you by said Carpenter and said Gardner?

A. No; there were two (2) spools of them brought in by Mr. C. L. Dempster, of this city. I could not identify these last two spools.

8 Q. Were the rest of the spools in that box brought to you by said Carpenter and Gardner?

A. They were.

9 Q. Look at that box and state how many of Coats' spools there are and how many of Merrick's spools.

A. There are fifteen (15) of Merrick's and seventeen (17) of Coats' spools.

10 Q. Are the labels and the general appearance of the Merrick spools near enough like the appearance of the Coats thread to deceive a casual observer?

A. I think they are.

11 Q. Did an agent of the Merrick Thread Company call upon you at any time lately or within the last six months?

A. There has one so called.

12 Q. State what, if any, representations were made to you by that agent.

438 A. He came up and he handed me his card. He wanted to sell me some Merrick thread. I told him that we were the agents of Auchincloss Bros. for the Coats' thread in this town and that we could use no other. I said to him, furthermore, that it was about all that we could do to sell two thousand (2,000) dozen a year. He said he understood that we sold more than that. I think Mr. Young may have said something of that kind. I looked at our books and found that we had sold a few dozen more than required, but told him that we could not afford to try to introduce another thread. He made a statement to the effect (I can't recall the exact works) that we could use the Merrick's thread together with the Coats', there not being much difference in the label and appearance of the spools, but I told him that wouldn't sell the Coats' thread for us. That is about all that *that* was said, only I told him two or three times we couldn't use another thread. I told him that we couldn't afford to introduce another thread—I mean we couldn't take the time to introduce a new brand.

13 Q. Was anything said to the effect that you could sell the Merrick for the Coats' thread sometimes?

A. Nothing more than that the appearance of the spools being so near alike we could sell the one for the other.

14 Q. When and where did this conversation take place?

A. I can't give the time—that is, the date, except that it took place some time last fall, and within six months, and at the office or store of C. F. Young & Brother, in Lake City, Minn.

15 Q. Is there any difference in the price to the trade of the Coats' and of the Merrick thread?

A. I don't know of my own knowledge the price of the Merrick thread.

16 Q. Were you present at the whole of the conversation between this agent and Henry A. Young?

A. I was not.

17 Q. Would it be an easy or a difficult matter to introduce any other thread in this town unless it did resemble Coats' thread?

439 A. I think it would be difficult. Coats' is the one thread used here.

18 Q. Then, if there was a new thread introduced here a close resemblance to the Coats' thread would aid its sale, would it?

A. I think it would.

19 Q. Under what circumstances did Mr. C. L. Dempster bring you those two (2) spools of thread?

A. I sent him out to buy them under instructions to buy them, calling for Coats' thread, and to take what was given him.

20 Q. Have those thirty-two (32) spools of thread been under your entire control since they were brought to you by those parties?

A. They were, inasmuch as they have been kept in our office in a box.

CHAS. A. KOCH, being cross-examined by Mr. WITTER, says:

21 X Q. The agent of the Merrick Thread Company to whom you have referred as having called upon you and tried to sell you the Merrick thread was Mr. H. Phillips, was it not?

A. I recognize the man here present and I believe his name is H. Phillips.

22 X Q. Who gave you instructions to send the persons Gardner, Carpenter, and Dempster out into the city to call for Coats' thread?

Objected to as immaterial and incompetent.

A. Messrs. Auchincloss Bros. gave me instructions to send parties out to purchase thread, calling for Coats' and taking what was given.

23 X Q. Were those instructions oral or written?

Same objection.

A. They were written.

440 24 X Q. Will you please produce them?

Same objection.

A. I produce the letter, dated November 29th, 1887, and reading as follows:

"Office of Auchincloss Brothers, 47 and 49 White St. P. O. box No. 2.

NEW YORK, *Nov.* 29, '87.

Mess. C. F. Young & Bro., Lake City, Minn.

DEAR SIRS: We have your favor of the 21st inst., and carefully note contents. You require to buy 220 doz. thd. before 31 Decr. to earn bonus 2,000 doz. in the year. We have a 6-spool work-box at 5 cents less 6 % for the box sample of which we express you to-day—by the same express we send you electr. of spools that will look well in the advertisement which you have placed—"beware of fraud," etc. Please send us a bill from this paper for a month's insertion of this 'ad.' We express you to-day 'prepaid' 5,000 small cards and some new French cards just out, which we trust you will use to advantage. We have a suit *vs.* The Merrick Thd. Co. for piracy of J. & P. Coats' trade-mark—now in the courts, for two weeks from Dec. 20—we have time to introduce new testimony—If yr. Mr. Young can testify to the fact that customers are deceived into the purchase of the Merrick thread by its similarity to Coats'

spools—or if he can find any one who has so been deceived—if they will make memo. of time, place and party so selling or better yet if they will call on those selling Merrick's at retail and asking for Coats' receive part of their request in Merrick's—we will pay the expenses of such witnesses to New York and return with such compensation for time and trouble as may be deemed fair and just. Should Mr. Young find it convenient to his business to come here between Dec. 20 and Jany. 3d, we will also make him this offer.

Should no such witness be available at the moment, if you
441 would select some reliable party (woman) who can try those keeping Merrick's with this in view—you can pay her on our acct. $2 p. dy. for a week, to thoroughly test the dealers.

The attempt of Merrick & Co. to secure an introduction to the public by copying Messrs. J. & P. Coats' spool head is a species of trading that should meet with general condemnation, and we ask J. & P. Coats' friends to assist us to suppress.

Yours truly, AUCHINCLOSS BROTHERS."

Defendants' counsel puts said letter in evidence, and it is marked "Lake City Exhibit C, Jan. 14, '88, A. E. S., notary."

25 X Q. How long has your firm had the agency of the Auchincloss Brothers for Coats' thread in this city?

Objected to as incompetent and irrelevant.

A. About seven years; it may be eight.

26 X Q. And you have sold no other six-cord thread during that time except Coats', have you?

Same objection.

A. None except what we had in stock at the time when we commenced this agency, seven or eight years ago.

27 X Q. What thread was it you then had some on hand of?

A. I couldn't answer that question, as that was when I entered the store. I think it was Clark's, but I don't know which Clark's.

28 X Q. Why have you been desirous of selling two thousand (2,000) dozen of Coats' six-cord thread in a year?

Objected to as incompetent and irrelevant.

A. In order that we may procure the bonus.

442 29 X Q. How much does that amount for two thousand (2,000) dozen of Coats' thread?

Same objection.

A. About ninety-three dollars.

30 X Q. And have you secured that bonus yearly?

Same objection.

A. We have—that is, we have it either yearly or semi-yearly.

31 X Q. And if I understand you upon the direct examination, your sales for a year are only a trifle in excess of the two thousand (2,000) dozen needed to secure the bonus; am I right?

A. With the exception of one year, when we used considerable more. Our store was burned out somewhere; from four to six hundred dozen were burned with the store.

32 X Q. What year was that fire?

A. April 22d, 1882.

33 X Q. For how many years has it been the practice of Coats' people or Messrs. Auchincloss Brothers to send you, free of expense, cards, advertising cards of various sizes?

Objected to as irrelevant and immaterial.

A. Ever since we dealt with them.

34 X Q. Have they also furnished you with a cabinet?

Same objection.

A. Well, they send a cabinet with every twenty-five or one hundred dozen lots, provided you take the thread in colors and numbers as put up in such cases or cabinets.

443 35 X Q. And does the name Coats appear prominently on the cabinets and their various advertising cards which they supply you with?

Objected to as incompetent and irrelevant and as not proper cross-examination.

A. It does.

36 X Q. By what name is this thread sold over your counters?

Same objection.

A. It is sold as Coats' thread when Coats' is asked for, and as thread when they asked for thread, but when it is described it is described as Coats'.

37 X Q. Have you had any familiarity with any other kind of six-cord thread except Coats'?

Same objection.

A. As far as relates to selling them or handling them, I have not.

38 X Q. Other than seeing an occasional spool, have you had any familiarity with any other six-cord thread except Coats'?

A. With none except Clark's O. N. T.

39 X Q. What familiarity did you ever have with that?

A. I had sold it for about a year, along the first year of my coming into this concern.

40 X Q. What does six-cord mean as distinguished from three-cord, as you understand it?

Objected to as immaterial, incompetent, and irrelevant.

A. It is a machine thread and a far better quality than that used as basting thread, and I also understand that the six-cord is made of six strands and the three-cord of three.

444 41 X Q. Which costs the most, the six-cord or the three, and about how much?

Same objection.

A. The three-cord costs considerably less, but I can't state just how much.

42 X Q. Do you buy of the Coats' only six-cord thread? Do you so understand it?

A. Yes.

43 X Q. And you have on sale here from numbers 8 to 130, have you not?

A. Yes.

44 X Q. I notice upon the flap of J. & P. Coats' box of No. 60 white, which you have furnished me from the store, have the words "best six-cord spool cotton, white and black, 8 to 200; brown and assorted colors, 8 to 100." Have you any reason to doubt the truth of these statements?

Objected to as incompetent, irrelevant, and immaterial, and as not properly arising on cross-examination.

A. I have not.

45 X Q. Will you look in your stock of Coats' thread and of boxes and state whether you find that language on others, both empty and full boxes in your store?

Same objection.

A. I do, and I produce an example of one of the flaps which I have taken from a full box on our shelves.

Defendants' counsel puts the said sample in evidence, and it is marked "Defendants' Lake City Exhibit No. 1, A. E. S., notary."

445 46 X Q. Look at your stock of Coats' thread again and state whether you do not find that language is changed upon the flaps of such boxes of thread as you have received from the Coats' people lately, so as to read "best six-cord spool cotton, white and black, 8 to 100; brown and assorted colors, 8 to 100," and will you also produce an example of such a box flap?

Objected to as incompetent, irrelevant, and immaterial and not properly arising on cross-examination, and complainants' counsel gives notice that the defendants are making the witness their own witness.

A. I do find it as stated and produce a sample.

Defendants' counsel puts in evidence the box flap produced by the witness, and it is marked "Defendants' Lake City Exhibit No. 2, A. E. S., notary."

47 X Q. If I understand you, the reason why you couldn't afford to deal in the Merrick thread was that it would reduce your sales of Coats' thread, and so prevent your getting the bonus due upon selling the two thousand (2,000) dozen; is not that so?

A. Yes; that is so. The town isn't large enough to sell two kinds of thread and earn a bonus on both.

The witness, CHARLES A. KOCH, is recalled, and the cross-examination of said witness, Chas. A. Koch, by Mr. Witter being resumed, said Chas. A. Koch on oath testifies on cross-examination as follows, to wit:

48 X Q. State the name of every person or firm from whom Gardner or Carpenter or Dempster bought spools of Merrick thread, which said spools are contained in the box "Complainants' Exhibit B"?

A. I can't answer that fully. I am not supposed to know where they got that thread.

49 X Q. But you do know, and you are desired to state without further evasion.

446 The form of the question is objected to by complainants' counsel on the ground that it assumes that the witness is evading an honest answer to the question, when it is apparent that he was not present when the persons named obtained the thread from persons.

A. I was told that the thread in that box was bought at Seeley & Buck's and at Anderson Bros.

50 X Q. By whom were you so told?

Question objected to by complainants' counsel as being hearsay evidence and as not being the best evidence.

A. I was told so by the parties bringing me the thread.

51 X Q. Give me their full names.

Same objections

A. G. Ford Carpenter, Wm. Gardner, C. L. Dempster.

52 X Q. Did neither of these three persons tell you of any purchase at any other place of any of the Merrick thread contained in that box?

Same objections.

A. Not that I remember.

53 X Q. Have you any information from any source of the purchase from any other party than Seeley & Buck and Anderson Bros. of any of the Merrick thread contained in that box?

Same objections.

A. I have not any such information.

54 X Q. Which of these three persons bought from Seeley & Buck, and which from Anderson Bros. any Merrick thread contained in that box?

Same objections.

447 A. I can't answer that; I don't know.

55 X Q. Did these persons make their report to you in writing or orally?

A. Orally.

56 X Q. When did they make their report?

A. What report do you mean?

57 X Q. I mean the report which you say was made to you orally, referring to the report of the purchase by them or either of them of any of the Merrick thread in that box, from either Seeley & Buck or from Anderson Bros.

A. Well, when they made their report it was made at the time that they brought the thread in.

58 X Q. When was that? Give us the date just as near as you can.

A. Between December 5th and 20th, to the best of my recollection.

59 X Q. Do you understand each one of them to have bought from both of these firms Merrick thread contained in that box? State what your understanding is in that regard.

Objected to as calling for hearsay evidence.

A. I can't say where the thread in the box was bought, but believe that Gardner and Carpenter (or "would think" is a better word) bought most of the thread which they brought in from Seeley & Buck.

60 X Q. Do you understand that Gardner and Carpenter went together or separately to Seely & Buck's on this business?

A. I understand they went separate.

61 X Q. Which of them do you understand made the purchase at Anderson Bros.'?

A. I don't know. I can't say which person went there; one of the three; I can't say which.

By mutual consent of both parties examination adjourned until to-morrow morning, January 17th, 1888, at 9.30 o'clock, at this same place, to wit, at the office of Abbot E. Smith aforesaid, in the
448 city of Lake City, Wabasha Co., Minn., when the taking of the depositions will be resumed.

ABBOT E. SMITH,
[SEAL.] *Notary Public, Wabasha Co., Minn.*

The further cross-examination of this witness, C. A. Koch, is postponed to permit of the examination of the witnesses G. Ford Carpenter and Wm. Gardner.

CHAS. A. KOCH.

Subscribed and sworn to before me this 16th day of January, A. D. 1888.

ABBOT E. SMITH,
[SEAL.] *Notary Public, Wabasha Co., Minn.*

On signing this the witness protests against being deprived of the letter marked "Lake City Exhibit C, January 14, 1888, A. E. S., notary," stating that "he was not in the room when said letter was marked and recorded as an exhibit," and complainants' counsel, R.

H. Moore, states that "he was not aware that the original letter was marked as an exhibit and did not consent thereto."

ABBOT E. SMITH,
[SEAL.] *Notary Public, Wabasha Co., Minn.*

On the request of the defendants' counsel the notary certifies as follows: That the defendants' counsel offers to allow said letter marked as above "Lake City Exhibit C, Jan. 14, 1888, A. E. S., notary," to be delivered to said Chas. A. Koch, provided that the copy thereof appearing in said Chas. A. Koch's testimony might be received in evidence with the same force and effect as the original letter, subject to such objections as complainants' counsel has made to the original; but said offer was refused by complainants' counsel.

ABBOT E. SMITH,
[SEAL.] *Notary Public, Wabasha Co., Minn.*

449 At 9.30 o'clock a. m., at the office of Abbot E. Smith aforesaid, in the city of Lake City, Wabasha county, Minn., on Tuesday, January 17th, 1888, met pursuant to above adjournment.

Present: R. H. Moore, of counsel for complainants, and W. C. Witter, of counsel for defendants.

STATE OF MINNESOTA, *County of Wabasha,* } *ss:*

G. FORD CARPENTER, a witness of lawful age, being called in behalf of the complainants and having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, being carefully examined by R. H. MOORE, of counsel for complainants, on oath testifies as follows, to wit:

1 Q. State your name, age, residence, and occupation.

A. G. Ford Carpenter; I reside at Lake City, Minnesota; my age is twenty-four; I am a book-keeper.

2 Q. State whether you have lately visited any store in Lake City for the purpose of purchasing spool cotton; and, if so, at whose request.

A. I did. At the request of C. A. Koch.

3 Q. State what stores you visited.

A. I visited Mr. Thomas, G. W. Thomas, Seeley & Buck, Kemp's, M. O. Kemp's, Raymond Hanisch, and Anderson Bros.

4 Q. State what spool cotton you asked for on the occasion in question on visiting those stores.

Objected to by defendants' counsel as leading; the witness should be asked to state the circumstances of each visit or purchase in his own language.

A. Well, I went to the different stores and asked for Coats' thread.

450 5 Q. Did you say "at each store I asked for Coats' thread?" Your words were so low that I didn't catch them.

A. That's what I said.

Defendants' counsel asks the magistrate to note whether the witness in fact used this language.

The magistrate notes that the answer to question four (4) was the entire answer of the witness.

6 Q. State whether, having asked for Coats' thread, you received any other make of thread; and, if so, when and where.

Same objection as to question 4.

A. I didn't take particular notice of the thread that I got, and at Mr. Thomas' I got just what I asked for, Coats' thread. I did at Kemp's also; also at Hanisch's. At Anderson Bros. I the first time received Merrick's thread, but not for Coats' thread; they told me they didn't have either the size or color I asked for in Coats' and gave me the other thread or asked me to take the other thread—that is, Merrick's; they gave me the thread, saying it was another thread, either better or equally as good, and I knew it was Merrick's. At Seely & Buck's I visited some three or four times; I don't remember just how many; sometimes I got Coats' and one time in particular I got Merrink's.

7 Q. At this particular time that you last referred to state what you asked for and describe the person who waited upon you and gave you Merrick's thread.

Same objection as to question 4.

A. I asked for two spools of thread—I have forgotten what size—Coats' thread; the person was Mr. Seeley.

451 8 Q. At the time he wrapped the spools up did he tell you what he was giving you—what make of thread?

Same objection as to question 4.

A. No, sir.

9 Q. What did you do with that little parcel after you received it from Mr. Seeley?

A. I gave it to Mr. Koch at C. F. Young & Brother's store.

10 Q. Did you see whose make of thread those spools were before they were wrapped up in Seeley & Buck's store—that is, did you examine them in the store?

A. I did not.

11 Q. Have you seen those spools of Merrick's thread since you passed them over to C. A. Koch?

A. No, sir.

12 Q. How did you pay for those spools of Merrick's thread, if at all?

A. I paid him with money—five cents apiece.

13 Q. Did you cause any other person to go to the stores and buy spool cotton in your place or street? If so, state the name or names.

Objected to as incompetent and hearsay.

Complainants' counsel here asks permission to call as a witness a person whose name is not mentioned on the notice to take these

depositions, to wit, Frank Carpenter, and possibly others, whose names will be furnished during the day.

A. I had my brother, Frank Carpenter, go to Seeley & Buck's once and get two spools of thread, and instructed him to ask for Coats' thread.

At this point in his answer complainants' counsel instructs the witness that he can't give any evidence of what his brother did out of his presence, but is ready to go into hearsay evi-
452 dence on this point if counsel for defendants will withhold his objection.

14 Q. Is Frank Carpenter this only person that you delegated to do that work?

A. It was.

15 Q. Do I understand that all the spools of thread that you and your brothers bought were given into the custody of C. A. Koch?

Objected to as incompetent.

A. Yes, sir.

Complainants' counsel rests here.

Defendants' counsel objects to all the foregoing testimony as not in rebuttal, as making out or tending to make out a new *prima facie* case, and as incompetent.

And, being cross-examined, the witness says:

16 X Q. How many spools of Merrick thread did you turn over to Mr. Koch which you purchased yourself from Mr. Seeley, of Messrs. Seeley & Buck, on the occasion when you went away with Merrick's thread after asking for Coats?

A. There were two spools.

17 X Q. How many spools of Merrick thread did you turn over to Mr. Koch which you yourself purchased of anybody?

A. I don't know.

18 X Q. Why not?

A. Well, I did't keep any particular track of them; some I got at Anderson Bros. at the time I referred to when they gave me Merrick's thread. I don't know how many there were of those.

19 X Q. Did you turn over to Mr. Koch any spools of Merrick thread purchased by yourself except the two spools you bought of Mr. Seely and the spools you bought of Anderson Bros.?

453 A. I did turn over one spool of Merrick's thread beside these, which I got at Seeley & Buck's one time before when I simply asked for a spool of thread. That was on my own account; I simply went then for a spool of thread and got Merrick's thread.

20 X Q. Give your best judgment as to how many Merrick spools you got at Anderson Bros. and turned over to Mr. Koch.

A. I think there were two spools; I am not positive about that.

21 X Q. Assuming that you are right in so thinking, that would

make five spools of Merrick thread that you turned over to Mr. Koch which were purchased by yourself; that is so, is it not?

A. Yes.

22 X Q. Now, how many of Coats' spools did you turn over to Mr. Koch which you bought yourself?

A. I don't know.

23 X Q. You turned over some Coats' spools to him, did you?

A. I did.

24 X Q. Tell how many as nearly as you can.

A. I should think eight or ten.

25 X Q. And were these eight or ten Coats' spools all bought under Mr. Koch's instructions to you?

A. They were.

26 X Q. Did you make a written memorandum of the circumstances of the purchase from Mr. Seely related in your answers to questions 7 and 8?

A. No; I did not.

27 X Q. Nor of any other purchase?

A. I did not.

28 X Q. When was it that you made the purchase of the two Merrick spools from Mr. Seely?

A. I can't give the exact date.

29 X Q. Give it as nearly as you can.

A. I should think about the eighteenth or twentieth of December, about a week or ten days before Christmas.

30 X Q. In what part of the store were you and Mr. Seely when you made this purchase?

454 A. Well, we were about in the center of the store, at the right-hand counter from the front door on Washington street going in.

31 X Q. Do you mean the first right-hand counter as you go in?

A. Well, I think it was the first counter; I stood along there.

32 X Q. Did he leave you to get the two spools of thread or did he get them right where he was standing?

A. He walked away a little distance along behind the counter.

33 X Q. In which direction?

A. Toward the front of the store.

34 X Q. How many spools of Merrick's thread did you turn over to Mr. Koch which were not purchased by you in person?

A. I don't know; I turned over some that my brother Frank got; I think there were two spools; perhaps not but one.

35 X Q. Have you now stated all the Merrick's thread you turned over to Mr. Koch?

A. I have.

36 X Q. How many spools of Coats' thread did you turn over to Mr. Koch in addition to the eight or ten already mentioned?

A. Not any, I think.

37 X Q. Who furnished the money to pay for these spools of Merrick's and Coats' thread which you turned over to M-. Koch?

A. In some instances Mr. Koch gave me the money and I went

and get the thread. In other instances I got the thread and paid for it from my own money and Mr. Koch paid me when I took the thread then to him.

38 X Q. How many visits in all did you make to all these dealers that you have mentioned?

A. I went once to Mr. Thomas', once to Mr. Kemp's, I think twice to Mr. Hanisch's—I won't be positive whether once or twice—
455 once or twice to Anderson Bros.', and three times, I think, either three or four, to Seely & Buck's.

39 X Q. Whom did you buy of on the occasion you went to Seely & Buck's, omitting the occasion you have described of the purchase of two Merrick spools from Mr. Seely?

A. Well, I bought once of the lady clerk, Miss Dorrance, and once of the young man in there; Sauter, I think, is his name. If I went there again I don't remember who I did buy of.

40 X Q. The Messrs. Auchincloss Brothers, agents for J. & P. Coats for the United States, seem to have authorized Messrs. C. F. Young & Brother to pay somebody two dollars a day for a week to go about here on the business which Mr. Koch, a partner of C. F. Young & Brother, intrusted to you. Have you received any compensation for this work?

Objected to as incompetent, irrelevant, and immaterial.

A. I have not.

41 X Q. Have you any understanding that you are to be compensated for it?

Same objections.

A. I have not.

42 X Q. Are you accustomed to undertake such jobs for C. F. Young & Brother or other people?

Same objections.

A. No, sir.

43 X Q. Why did you do so in this instance?

A. Mr. Koch is a friend of mine, and came and asked me to go and buy some thread, and I went.

44 X Q. What instructions did he give you? State them all.

A. He told me to go to different stores and ask for Coats'
456 thread. I think he specified my asking for No. 40, as that was the kind most generally called for, and to take what I received. That's all.

45 X Q. Did he not instruct you to employ your little brother in this business?

A. He did not at the first. After I had been there myself once or twice he said I might get some boys to go. I don't think he specified my brother.

46 X Q. In what year and month was your brother Frank born?

A. I can't tell you.

47 X Q. How old is he?

A. He is, I think, twelve years old. I won't be positive.

48 X Q. Of whom do you understand that your brother Frank bought Merrick's thread under your instructions or the instructions of Messrs. C. F. Young & Brother?

A. I think he bought of the lady, Miss Dorrance.

49 X Q. But nowhere else?

A. No; he did not go to any other store that I know of.

50 X Q. And he made only one purchase at Seely & Buck's, if I understand you?

A. I think he made but one purchase, but will not be positive. Perhaps he went there twice.

51 X Q. Don't you expect any pay for this business, whether done by yourself or by your brother as agent?

A. I do not.

52 X Q. You did it out of friendship, did you?

A. I did it as a matter of accommodation to Mr. Koch; yes.

53 X Q. Was the purchase by your brother made at about the same time as your own?

A. Yes; about the same time.

54 X Q. How about the purchases by William Gardner? Were they made about the same time, too?

Objected to as calling for hearsay evidence.

A. Why, I suppose they were. I don't know when he made his purchase.

457 55 X Q. Then you did not hunt in pairs, but singly? Is that so?

Objected to as irrelevant and immaterial.

A. I went single; I don't know how the rest went.

56 X Q. At what store did William Gardner get Merrick's thread, as you are informed?

Objected to as calling for hearsay evidence.

A. I don't know. I think Mr. Koch said he got some at Seely & Buck's. I'm not positive that he said anything about it.

57 X Q. Read cross-questions 44 and 45 and the answer- to them and state whether you have now mentioned all the instructions you received from Mr. Koch.

A. I think I have.

58 X Q. Are you not sure?

A. He told me not to say anything to outsiders about it; that was after I had finished buying the thread, though.

59 X Q. And have you kept pretty still about it under these instructions from the agents in this city, of Auchincloss Brothers, who represent Sir Peter Coats and other Coats in this country?

Objected to as irrelevant and immaterial.

A. I have.

60 X Q. Have you now stated all the instructions you received in connection with this affair?

A. I don't remember anything more.

61 X Q. Please reflect carefully and see if you can't recall something else in the way of instructions and state whether you do or not.

A. I don't recall anything else.

62 X Q. You received no instructions from H. A. Young, Mr. Koch's partner, did you?

A. I think not.

458 63 Q. Where were you when you received from Mr. Koch the instructions recounted in your 44th answer?

A. I was in my office, opposite the store of C. F. Young & Brother.

64 X Q. And where were you when you received from Mr. Koch the instructions to get some boys to go?

A. At one time I was in my office and another time I was in the store of C. F. Young & Brother.

65 X Q. Then he gave these instructions to get some boys to go twice, did he?

A. He spoke about it once in my office, and I think afterwards he mentioned it in C. F. Young & Brother's store a day or two afterwards.

66 X Q. Did you send any other boys except your younger brother Frank?

A. I did not.

Redirect examination is resumed by Mr. MOORE of this said witness, G. FORD CARPENTER, who, being examined, on his oath replies as follows, to wit:

67 Re-D. Q. Are your personal relations with C. A. Koch of a very friendly and intimate character or otherwise?

A. They are very friendly and quite intimate.

68 Re-D. Q. Whereabouts did you stand in Seely & Buck's store when you first accosted Mr. Seely on the occasion that he served you with the Merrick thread?

A. I stood in the front part of the store, near the left-hand counter, and Mr. Seely came and asked me if there was anything I wanted. I told him what it was, I think a piece of cotton cloth, and he went to get it for me in the centre of the store on a centre table. I afterwards asked him for thread. He was then standing behind the right-hand counter. I was standing in front of it. I should judge that it was about half way down the right-hand counter from the front.

69 Re-D. Q. Something has been said about your getting thread from their lady clerk, Miss Dorrance. Did she make any
459 statement to you as to the kind of thread she was serving you with? State all that occurred between you.

A. She said nothing about the thread; she gave me the thread when I asked for it.

70 Re-D. Q. Simply wrapped up some spools and passed them over to you; was that it?

A. Yes, sir.

71 Re-D. Q. When you sent your brother Frank to Seely & Buck's store, did he come back directly to you and report the result?

A. He delivered the evening paper and stopped at Seely & Buck's on his trip in the evening, and I did not see him until the next morning, and then he reported.

72 Re-D. Q. Can you tell how many spools of thread you bought at the store of Anderson Bros. altogether—that is, of both brands?

A. I can't state positively; I think four or five spools.

73 Re-D. Q. Having reference to cross-question 25, I wish to know whether the whole number of spools (comprising both brands) that you turned over to C. A. Koch were bought under his instructions to you.

A. Yes.

Recross-examination resumed by Mr. WITTER:

74 Re-X Q. Were you subpœnaed in this case?

A. No, sir.

G. FORD CARPENTER.

Subscribed and sworn to before me this 17th day of January, A. D. 1888.

ABBOT E. SMITH,

[SEAL.] *Notary Public, Wabasha County, Minn.*

Complainants' counsel here receiving a telegram from Samuel R. Betts, directing that no more witnesses be called, because the time expires to day for completing their depositions, hence the
460 witness Wm. Gardner is not called for the complainants; but the defendants' counsel is offered an opportunity to proceed to night with any further cross-questions that he may have to propound to the witness C. A. Koch; but, it being now eight (8) o'clock p. m., Mr. Witter declines to avail himself of the offer, deeming it unreasonable.

ABBOT E. SMITH,

[SEAL.] *Notary Public, Wabasha Co., Minn.*

Defendants' counsel states that on Tuesday, the 10th day of January, before he left New York, he stated to Samuel R. Betts, complainants' counsel, that he had arranged to postpone his Washington engagement, beginning January 18th (to allow for which the order of the court made an interim of four days in the taking of testimony), in order that defendants' counsel might remain in Lake City till complainants' Lake City testimony should be completed and not be compelled to return there for that purpose, and that this postponement of the Washington engagement was made by understanding with said Samuel R. Betts to allow complainants' counsel (Betts) to examine in New York a witness there present from Chicago on Tuesday of last week and another on Wednesday, and then to have time to complete the Lake City testimony, even if it took the balance of this week, and defendants' counsel agreed with said Betts to stay over in Lake City through the week, till complainants' testi-

mony was finished; and it was upon this understanding that the taking of testimony in Lake City originally noticed for Thursday morning, the 12th inst., was first adjourned to Friday, the 13th, and then to Saturday, the 14th.

Defendants' counsel further states that complainants' counsel here, R. H. Moore, city attorney for the city of Lake City, Minnesota, united early to-day with defendants' counsel, W. C. Witter, in the following telegram to complainants' counsel in New York:

461 "JANUARY 17, 1888.

"Betts, Atterbury, Hyde & Betts, 120 Broadway, New York:

"To save coming back here, can each side call other witnesses than those specified in notice during this week only? We both agree to this here. Answer.

"R. H. MOORE,
"W. C. WITTER."

To which telegram the following answer was received:

"NEW YORK, *January* 17, 1888.

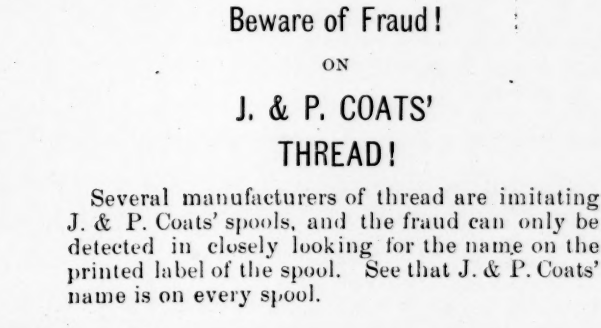
"R. H. Moore, Lake City, Minnesota:

"Do not call any more witnesses. Our time expires to-day.
"SAM'L R. BETTS."

Defendants' counsel further says that he is willing to go on and complete the testimony of complainants' witnesses here this week, beginning to-morrow morning at any suitable hour, it being now quarter of nine o'clock p. m., and he protests against being compelled to return here to Lake City for that purpose.

ABBOT E. SMITH,
[SEAL.] *Notary Public, Wabasha Co., Minn.*

462 COMPLAINANTS' EXHIBIT A (Offered p. 394).



463 United States Circuit Court, Southern District of New York.

Sir PETER COATS *et al.*
vs.
THE MERRICK THREAD COMPANY. } In Equity.

It is hereby stipulated and agreed that William H. Kenyon act as special examiner in the above-entitled cause, and that the testimony taken before him be used upon the hearing of said cause in the same manner and with the same effect as if taken before one of the standing examiners of the court.

New York, May 20, 1886.

(S'g'd) VARNUM & HARRISON,
Compl'ts' Solicitors.

(S'g'd) BROWN & WITTER,
Def'ts' Solicitors.

United States Circuit Court, Southern District of New York.

Sir PETER COATS *et al.*
vs.
THE MERRICK THREAD COMPANY *et al.* } In Equity.

464 Testimony taken on behalf of defendant-, under and pursuant to the 67th rule in equity (as amended), before William H. Kenyon, special examiner by consent.

NEW YORK, *May* 20, 1886.

Met pursuant to notice.

Present: F. H. Betts, Esq., and I. M. Varnum, Esq., of counsel for complainants, and W. C. Witter, Esq., of counsel for defendant-.

LYMAN R. HOPKINS, a witness of lawful age produced on the part of defendants, being by me first duly cautioned and sworn to speak the truth in the matter in controversy herein, and being examined by W. C. Witter, Esq., of counsel for defendants, deposes and says:

465 1 Q. What is your name, age, residence, and occupation?

A. Lyman R. Hopkins; 62 years old; president of Merrick Thread Co.; I reside in Brooklyn, New York.

2 Q. By Merrick Thread Co. you mean one of the defendants in this case, do you not?

A. Yes.

3 Q. How long have you been president of the Merrick Thread Company?

A. Twelve years last January.

4 Q. When was that company incorporated and where?

A. In 1865; at Holyoke, in the State of Massachusetts.

5 Q. Where are its factories located?

A. At Holyoke.

6 Q. How long have you been an officer of The Merrick Thread Company, defendant?

A. Ever since its incorporation?

7 Q. Previous to 1865, the date of its incorporation, under what name was the business carried on?

A. Merrick Bros. & Co.

8 Q. For how long under that name?

A. Four or five years, and perhaps longer.

9 Q. What has it been the business of the Merrick Thread Co. and Merrick Bros. & Co. to make and sell during all these years?

A. Spool thread.

10 Q. Exclusively?

A. Yes.

11 Q. Give briefly a statement of the magnitude of the business, mentioning the number and character of the buildings at Holyoke and the number of employés in the pay of the company.

A. We have four mills, the largest one being 300 feet long, 95 feet wide, and four stories high. The next one is 200 feet long, 85 feet wide, four stories high. The third one is 200 feet long, 60 feet wide, and three stories high. The fourth is 150 feet long, 50
466 feet wide, and three stories high. There are various other buildings connected with the establishment. Our pay-roll for the last five years has averaged a thousand names. At the present time we are running about fifty thousand spindles.

12 Q. State whether the enterprise has been one of gradual and uninterrupted growth from the beginning to the present time.

(Objected to as leading and calling for a conclusion merely.)

A. It has.

13 Q. Will you state what has been the purpose of the managers of the business?

(Objected to as immaterial and incompetent.)

A. The purpose has been to found and build up in this country a manufacture of spool thread that should be of the best quality and make the same profitable to the stockholders of the company on the merits of the goods produced.

14 Q. State how long that has been the policy of your company.

(Same objection.)

A. Ever since its incorporation.

15 Q. How was it previous to the incorporation, so far as you are acquainted with the facts?

(Same objection.)

A. So far as I know, it was the same.

16 Q. In 1865, when you became an officer of the Merrick Thread Co., what were the principal brands of thread which were occupying the market in this country, or substantially so, excluding the Merrick Thread Co. and its predecessor?

A. J. J. Clark & Co., Orrs and Macnaught, Coats', the Willimantic, and George Clark's came into the market about that time. I mean the O. N. T. thread.

467 17 Q. Please make your last remark about O. N. T. thread a little plainer.

A. I mean the thread made by the Clark Thread Co. at Newark, New Jersey.

18 Q. About what fraction of the thread business in this country was done in 1865 by the makers whom you have named above or their agents? Answer as to the family trade and manufacturing purposes separately.

(Objected to, as competency is not shown.)

A. I should say seven-eighths of the family trade and about one-half of the manufacturing trade.

19 Q. Which of the above-mentioned companies had manufactories in this country and which sold their thread here through agents or by importation only?

A. The Willimantic Co. made theirs here and the Clark Thread Co. at Newark; they were the only ones of those whom I mentioned who made their thread here.

20 Q. State whether the Clark manufacture here was a branch or offshoot of their foreign business. What is your understanding on the subject?

A. I understand that they had a manufactory at Paisley, Scotland, at the same time.

21 Q. For how many years have you been engaged in the business of spinning cotton into yarn or thread in this country?

A. Forty-one years.

22 Q. In 1865 what thread was most used for manufacturing purposes in this country?

(Same objection.)

A. Three-cord.

23 Q. What was used for family purposes?

A. Three-cord and six-cord and some four-cord.

24 Q. Which is the best, three-cord, four-cord, or six-cord?

A. Six-cord.

468 25 Q. Which next best?

A. Four-cord.

26 Q. State whether this is true for all purposes for which spool thread is used.

A. I should say it was.

27 Q. Why, then, has three-cord thread been so largely used for manufacturing purposes?

A. Because it was cheaper in price.

28 Q. And why for family purposes instead of four or six cord?

A. Same reason.

29 Q. Which costs the most to make, six-cord or three-cord? And state the difference, if any.

A. Six-cord thread of the same number costs just about twice as much as three-cord.

30 Q. When you say the same number do you mean the same size of thread?

A. I do.

31 Q. Then, if I understand you, you mean that it costs just about twice as much to make a given number of yards of a certain number or size six-cord as it does to make the same quantity of the same size three-cord, the quality of the material used being the same. Am I right?

A. That is what I mean.

32 Q. How does the cost of making six-cord thread compare with the cost of making four-cord thread?

A. I should say that six-cord costs about one-third more.

33 Q. Taking number 50 thread as an example, state how three-cord number 50, four-cord number 50, and six-cord number 50 are made respectively.

A. Three-cord number 50 is made of three strands of No. 50 yarn; four-cord No. 50 would be made of four strands of No. 67 yarn; six-cord No. 50 would be made of six strands No. 100 yarn; in making the six-cord two strands of No. 100 yarn are first twisted together; then three of those strands are twisted together to make the No. 50 thread.

469 34 Q. State whether No. 150 three-cord, four-cord, and six-cord thread are or ought to be of the same size.

A. They should be.

35 Q. And state whether No. 50 thread of the various leading manufacturers of thread is all of the same size or substantially so unless there is some attempt to make it different for some unexplained purpose.

(Objected to as leading.)

A. I should say they were.

36 Q. What are the reasons that six-cord thread is so much more expensive to make than three-cord thread?

A. In the first place, the yarn for six-cord has to be spun just twice as fine. In the next place, there is more than twice as much twisting; taking, for instance, No. 50 thread, the two strands of No. 100 yarn have to be twisted together first, then three of such strands have to be twisted again to make the six-cord thread, whereas three strands of No. 50 yarn would be simply twisted together to make No. 50 three-cord thread.

37 Q. State whether this increase in the cost of manufacture has its counterpart in an increased price exacted for the six-cord thread; and, if yea, state to what extent this is true.

A. Six-cord thread made of the same material brings about double the price of three-cord thread in the market.

38 Q. Is this true both at wholesale and retail?

A. Yes.

39 Q. How universally?

A. It was always so, so far as I know, except where a three-cord thread has been attempted to be sold as six-cord.

40 Q. What proportion of thread sold to-day for family use in this country is six-cord?

(Objected to, as the competency of the witness is not shown.)

A. I should say seven-eighths.

470 41 Q. Do you mean that all this is in fact six-cord, or that some part of it is understood to be six-cord or sold as six-cord which is not in fact six-cord?

(Same objection, and objected to as already answered and as an attempt to try and make the witness change his answer.)

A. There is some thread sold as six-cord that is not six-cord.

(Objected to by complainants' counsel as irresponsive.)

42 Q. Do you include this latter class of thread in your estimate of the seven-eighths, or do you mean that seven-eighths of the thread sold for family use to-day in this country is really six-cord?

(Same objection as to Q. 41.)

A. I include all that is sold as six-cord.

43 Q. State what numbers of thread were made of six-cord in 1865, when you became an officer of the Merrick Thread Co., and state what had been previously and what has been since that date the practice with reference to the manufacture of six-cord thread.

(Objected to, as the competency of the witness is not shown.)

A. Most of the leading thread-makers in 1865 were making six-cord thread up to and including No. 60. Some time previous to that it had only been made six-cord up to No. 40. Since that time all of the leading companies have advanced six-cord make up to and including No. 100.

44 Q. State whether you have been familiar with the course of manufacture and trade of the thread business in this country, and how familiar and for how long, and what efforts you have made and continue to make to become thus familiar, and whether or not it is a part of your business as president and officer of a great

471 thread manufacture to become and to be competent to give opinions and state facts regarding the course of this manufacture and business.

(Objected to as calling for a conclusion.)

A. I have been familiar with the manufacture of thread for the last twenty years; I have made it my business to examine the different threads manufactured in this country and in Europe; I have been in the market, watched the prices, and looked after the making and selling spool thread for the same time. I consider it a part of my business to tend to those things.

45 Q. What portion of your time has been devoted during these years to becoming acquainted with the different threads upon the market, the modes of manufacture, the qualities, the comparative demand for the various makes, qualities, and sizes, and with the market generally in that branch of manufacture?

A. For the last twelve years my time has been devoted entirely to that; previous to that at least one-half of my time since 1865.

46 Q. State whether previous to 1865 you had been a dealer and familiar to a somewhat less extent with the threads upon the market.

(Objected to as leading.)

A. I had.

47Q. Before stating thus in detail your qualifications to answer you were speaking of the advance in the manufacture of six-cord thread from No. 40 onward. To what number has the manufacture of six-cord thread been advanced by any manufacturer in this country?

A. To No. 140.

48 Q. Why has there been this advance from No. 40 to higher and higher numbers in the manufacture of six-cord thread?

(Objected to as incompetent, as it is manifest that the witness cannot speak of any motives other than those which actuated
472 his own concern, and he has not yet seen fit to state who the manufacturer is who advanced the manufacture of six-cord thread No. 140.)

A. When sewing machines commenced to come into the market they wanted a better and a finer thread than had been previously used in hand-sewing, and the demand has constantly been growing for a finer six-cord thread. There has been a great deal of competition and strife as to which companies could and did make finer numbers of six-cord, as that was a great help in the sale of their thread.

(Answer objected to as far as the witness pretends to speak in regard to other companies, as there is no evidence that he knows anything on the subject.)

49 Q. Who were the first to advance the six-cord thread make to No. 80, and about when was this advance made?

A. I think Orrs & Macnaught were the first; I should say about 1865.

50 Q. Who were the first to advance the six-cord make beyond 100?

A. The Merrick Thread Co., so far as I know.

51 Q. When did they make this advance?

A. About three years ago.

52 Q. Previous to making this advance, about three years ago, was there any mark upon the said thread of numbers higher than 100 or upon the boxes containing such thread or upon any advertisement of the company or anywhere else to the effect that such thread was six-cord?

A. There was not, with one single exception, which I will name. About six years ago I was at the mill, in the packing-room. I saw a box of No. 110 thread which had a label on the cover, which read six-cord. I asked the foreman if that was six-cord thread in the box. He said no; it was three-cord. I told him that there must

be no more boxes of that kind put up, and from that day to
473 this there has not been any. If there has it has been against my orders. I don't suppose there has; I never saw any.

Adjourned to May 21st at 10.30 a. m.

NEW YORK, *May* 21, 1886—10.30 a. m.

Met pursuant to adjournment.
Present: Counsel as before.

Continuation of the examination of LYMAN R. HOPKINS by W. C. WITTER, Esq.:

53 Q. When you made this discovery did you ask for any reason why this 110 200-yard three-cord thread had been described upon the box as six-cord? If yea, what did you learn on that subject?

(Objected to as calling for hearsay evidence.)

A. The reason they gave me for putting it in a box of that kind was that Coats and the Willimantic marked their boxes in that way in that number.

54 Q. With the exception of the marking above referred to, state how your company has marked its 200-yard three-cord thread in the numbers higher than 100 and produce a sample of the label used upon that thread and a sample of the boxes in which the dozens were packed.

A. I produce a sample of the label of the spool; also a box showing how they were packed; also a label on the other end of the spool.

(Defendants' counsel offers in evidence the article first produced, and it is marked "Defendants' Exhibit No. 18, Label for One End of Three-cord 200-yd. Thread, W. H. K., notary.")

55 Q. State whether there was one label or six labels on the article you first produced.

474 A. Six.

56 Q. State whether all the labels used on 200-yard three-cord thread by your company have been in all respects like the six labels of Defendants' Exhibit No. 18.

(Objected to as leading.)

A. They have.

57 Q. Have they not varied as to the number on those labels; and, if so, in what respect?

(Same objection.)

A. They have varied from 110 to 140.

(Defendants' counsel puts in evidence the second article produced by the witness in answer to question 54, and it is marked "Defendants' Exhibit No. 19, Box Containing Three-cord 200-yd. Thread, W. H. K., notary.")

58 Q. Look at Defendants' Exhibit No. 19, Box Containing Three-cord 200-yd. Thread, and state whether the said box with the spools of thread contained in it show in all respects how all the defendants' three-cord 200-yard thread has been marked and boxed and how the boxes have been marked; of course, I except from this question the boxes of 110 which you have heretofore stated were marked six-cord upon the box.

(Objected to as leading.)

A. They do.

59 Q. Were the boxes all marked "black" on the outside?

A. Not unless there were black in them.

(Defendants' counsel puts in evidence the third article produced by the witness in answer to question 54, and it is marked "Defendants' Exhibit No. 20, Label for Reverse End of Three-cord 200-yard Thread, W. H. K., notary.")

475 60 Q. Were there one or four labels upon the article which you produced last in answer to question 54?

A. Four.

61 Q. What was the effect of the failure to designate the numbers higher than 100 of 200-yd. thread as six-cord thread?

A. We sold very little of it.

62 Q. To what do you attribute that fact?

A. Because it was not represented as six-cord thread.

63 Q. Did you have any such difficulty with the lower numbers—that is, up to 100, inclusive?

A. No.

64 Q. To what did you attribute that fact?

A. Because it was plainly marked on the box that it was six-cord thread.

65 Q. And also on the spool label?

A. Yes.

66 Q. When you began to make the finer numbers six-cord and to mark it six-cord, what took place?

A. Our sales in those numbers commenced to increase steadily.

67 Q. Please produce a box showing how the defendants have put up and marked the 200-yd. thread of finer numbers than 100 since they began making it six-cord.

A. I herewith produce a box No. 140, white six-cord thread.

68 Q. State whether the boxes of the other numbers, to wit, Nos. 110, 120, 130, have been marked the same as the box produced, both upon the box and upon the ends of the spools, with the exception of a change in the number or a designation of the color of the thread.

(Objected to as leading.)

A. They have.

476 (Defendants' counsel puts the said box in evidence, and it is marked "Defendants' Exhibit No. 21, Box Containing Six-cord 200-yd. Thread, 110 to 140, W. H. K., notary.")

69 Q. When you became an officer of the Merrick Thread Co., in 1865, by what sort of label was the best quality of 200-yd. thread designated in the market? Describe the label.

A. I should say by a black and gold label, with concentric rings, the name of the maker appearing on the outside ring; it had figures on it designating the number of the thread and reading describing the quality of the thread as best six-cord, superior six-cord, and sometimes six-cord.

70 Q. State whether these labels, in addition to what you have stated, sometimes bore characters describing the length of the thread.

(Objected to as leading and as incompetent.)

A. They did.

71 Q. How universal was this practice in 1865 of using a black and gold label of concentric rings, with the information above referred to upon it, upon one end of the spool of the best quality 200-yd. thread?

A. It was so on all these makers of 200-yd. spool thread, six-cord, that I had seen up to that time, and included J. & J. Clark & Co., Orrs & Macnaught, Coats, Willimantic, and George Clark, and I was also acquainted with John Clark, Jr., & Co.'s black and gold label, which also included a silver line with the black and gold.

72 Q. State whether this list which you have given includes all the leading makess of 200-yd. six-cord thread for the time referred to which had any considerable hold upon the market

A. I should say it did.

73 Q. Were you situated so as to be likely to know all the leading threads on the market of that class?

A. Yes.

74 Q. And have you been so situated ever since?

A. Yes.

477 75 Q. Look at Defendants' Exhibit No. 1, Willimantic No. 50 Thread, and state whether that exhibit bears upon one end the black and gold label which you referred to in answer to question 71.

A. It does.

76 Q. State how long, approximately, the Willimantic 200-yd. six-cord thread has been upon the market in this country with the black and gold label upon it appearing upon one end of Defendants' Exhibit No. 1 Willimantic No. 50 Thread.

(Objected to as immaterial.)

A. I should say about 21 years.

77 Q. To what extent?

(Objected to as incompetent and also as immaterial.)

A. There has been a large manufacture of that thread.

78 Q. How do you know?

(Objected to as immaterial.)

A. I know by coming in competition with them in the trade.

79 Q. About when did the Willimantic begin to put that thread upon the market so labeled?

(Same objection.)

A. About twenty-one years ago.

80 Q. Look at Defendants' Exhibit No. 6, Orrs & Macnaught No. 40 Thread, and state whether that exhibit bears upon one end the black and gold label which you referred to in answer to question 71 in referring to the Orrs & Macnaught thread.

A. Yes; it does.

81 Q. State how long, approximately, the Orrs & Macnaught 200-yd. six-cord thread was upon the market in this country with black and gold label upon it appearing upon one end of Defendants' Exhibit No. 6, Orrs & Macnaught No. 40 Thread.

(Objected to as immaterial.)

478 A. I should think about eighteen or twenty years.

82 Q. State when and whether that thread was a popular and well-known thread for any period and why.

(Same objection, and objected to as incompetent.)

A. It was popular thread from 1857 to 1870. Its popularity was attributed to its being six-cord in higher numbers than any other make.

83 Q. Did you deal in it; if so, about when?

A. From 1856 to 1858.

84 Q. Look at Defendants' Exhibit No. 2, George A. Clark No. 50 Thread, and state whether that exhibit bears upon one end the black and gold label which you referred to in answer to Q. 71 in referring to George Clark's thread.

A. Yes.

85 Q. State how long, approximately, the George A. Clark 200-yd. six-cord thread has been upon the market in this country with the black and gold label upon it appearing upon one end of Defendants' Exhibit No. 2, George A. Clark No. 50 Thread.

(Objected to as immaterial.)

A. About twenty years, beginning about 1865 or 1866.

86 Q. In answer to Q. 71 you mentioned a thread of J. & J. Clark & Co. Produce a spool of that thread, if you can, and state when you first had knowledge of that thread upon the market in this country with the black and gold label of that spool appearing upon it.

(Objected to as immaterial.)

A. I should say about 1850 to 1852. It was in that time. I produce a spool of that thread.

87 Q. State when, as a thread dealer and manufacturer, you understand this thread so marked to have been upon the market in this country, and to what extent.

(Objected to as leading; also as immaterial.)

479 A. I have heard and always understood that J. & J. Clark's thread with a gilt and black label was the first spool thread sent to this country from abroad.

(Complainants' counsel moves to strike out the answer as hearsay evidence.)

(Defendants' counsel puts the said spool of thread in evidence, and it is marked "Defendants' Exhibit No. 22, J. & J. Clark's No. 50 Thread, W. H. K., notary.")

88 Q. During the time from 1850 to the present time have there been other makers of 200-yd. six-cord thread who have used black and gold labels with concentric rings, said labels bearing the name of the maker, the size of the thread, the length of the thread, and the quality? I mean in this country.

(Objected to, as witness is not shown to be competent to testify as to the condition of the business in spool threads previous to 1865.)

A. There have been—Williston mills, Semples, Kerr & Co., the thread that Stewart made, Clark C. I. S., and the Hadley Company and E. Ashworth & Sons.

89 Q. Please produce a sample of each one of those manufactures.

A. I do so.

(Defendants' counsel puts in evidence the samples produced, and they are marked respectively "Defendants' Exhibit No. 23, Williston's No. 70 Thread, W. H. K., notary;" "Defendants' Exhibit No. 24, J. Clark & Co. Stewart No. 40 Thread, W. H. K., notary;" "Defendants' Exhibit No. 25, Hadley Company No. 40 Thread, W. H. K., notary," and "Defendants' Exhibit No. 26, E. Ashworth & Sons' No. 60 Thread, W. H. K., notary," and also "Defendants Ex-
480 hibit No. 16, Semples No. 30, W. H. K., notary," and "Defendants' Exhibit No. 17, Kerr's No. 50, W. H. K., notary.")

90 Q. When did the Merrick Thread Co. begin to make and put upon the market 200-yd. six-cord thread?

A. In the early part of 1868.

91 Q. Describe the black and gold label which they first used upon it.

A. It was exactly like the ones marked A on the card herewith produced, except that the number designating the size of the thread varied.

(Defendants' counsel puts in evidence the card produced by the witness, and it is marked "Defendants' Exhibit No. 27, Card of Defendants' Black and Gold Labels, W. H. K., notary.")

92 Q. How long did your company use that label on that thread of that length?

A. About ten years.

93 Q. During that period what other black and gold label did the company use on some of its six-cord thread, to wit, some of longer length?

A. We used one exactly like the one marked B on Exhibit 27, only the numerals varied on different numbers of thread.

94 Q. How long was that used on such length of thread?

A. About nine years.

95 Q. What change was made, when was it made, and why?

A. When the company was incorporated, in 1865, the former president, Mr. Johnson, wished to have the name of the company the American Thread Co.; Mr. Merrick wished to have it the Merrick Thread Co., and it was finally decided to name the company the Merrick Thread Company. When we commenced to make six-cord thread, in 1868, Mr. Johnson, then president, claimed that the
481 200-yd. six-cord thread should have the name American Thread Co. on it, and it was finally decided to so have it in order to designate more closely the six-cord from the three-cord thread, which had the Merrick name on it. About 1877 our business of six-cord thread had been increasing proportionally to the three-cord until the sales of six-cord were larger than the sales of three-cord. The company, wishing to have its own name appear on their largest production, decided to change the name from the American Thread Company to the Merrick Thread Co. on the six-cord thread.

96 Q. Did Mr. Johnson oppose this change?

(Objection as immaterial.)

A. No, sir; he was then dead. He would have objected if he had been alive. There was a struggle over the matter when the thread was first made.

97 Q. Please produce samples of the labels used after the change was made as narrated above.

A. They were exactly like those marked C on Defendants' Exhibit No. 27 excepting the numeral indicating the size of the thread.

98 Q. Was the word American still preserved upon the spool anywhere; if so, where and how?

A. The word American was placed on the other end of the spool to preserve the identity of the thread, showing that it was the same make.

99 Q. I observe that when the change was made, in 1878, the labels marked C on the card were made to resemble more closely the label marked B than those marked A in some respects. Please state why that was so done, if you know.

A. When we made this change we had a consultation over the matter, and we found that the label marked B on Exhibit No. 27 was a much plainer and more distinct label, and in getting up our new label we decided to have them like the one marked B, it being much more plain to see the name and to show who the manufact-
482 urer was, and we had the whole line of six-cord thread made to correspond in its labels with that label.

Adjourned for luncheon.

(Objected to as leading; also as immaterial.)

479 A. I have heard and always understood that J. & J. Clark's thread with a gilt and black label was the first spool thread sent to this country from abroad.

(Complainants' counsel moves to strike out the answer as hearsay evidence.)

(Defendants' counsel puts the said spool of thread in evidence, and it is marked "Defendants' Exhibit No. 22, J. & J. Clark's No. 50 Thread, W. H. K., notary.")

88 Q. During the time from 1850 to the present time have there been other makers of 200-yd. six-cord thread who have used black and gold labels with concentric rings, said labels bearing the name of the maker, the size of the thread, the length of the thread, and the quality? I mean in this country.

(Objected to, as witness is not shown to be competent to testify as to the condition of the business in spool threads previous to 1865.)

A. There have been—Williston mills, Semples, Kerr & Co., the thread that Stewart made, Clark C. I. S., and the Hadley Company and E. Ashworth & Sons.

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480 hibit No. 16, Semples No. 30, W. H. K., notary," and "Defendants' Exhibit No. 17, Kerr's No. 50, W. H. K., notary.")

90 Q. When did the Merrick Thread Co. begin to make and put upon the market 200-yd. six-cord thread?

A. In the early part of 1868.

91 Q. Describe the black and gold label which they first used upon it.

A. It was exactly like the ones marked A on the card herewith produced, except that the number designating the size of the thread varied.

(Defendants' counsel puts in evidence the card produced by the witness, and it is marked "Defendants' Exhibit No. 27, Card of Defendants' Black and Gold Labels, W. H. K., notary.")

92 Q. How long did your company use that label on that thread of that length?

A. About ten years.

93 Q. During that period what other black and gold label did the company use on some of its six-cord thread, to wit, some of longer length?

A. We used one exactly like the one marked B on Exhibit 27, only the numerals varied on different numbers of thread.

94 Q. How long was that used on such length of thread?

A. About nine years.

95 Q. What change was made, when was it made, and why?

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481 200-yd. six-cord thread should have the name American Thread Co. on it, and it was finally decided to so have it in order to designate more closely the six-cord from the three-cord thread, which had the Merrick name on it. About 1877 our business of six-cord thread had been increasing proportionally to the three-cord until the sales of six-cord were larger than the sales of three-cord. The company, wishing to have its own name appear on their largest production, decided to change the name from the American Thread Company to the Merrick Thread Co. on the six-cord thread.

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(Objection as immaterial.)

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A. When we made this change we had a consultation over the matter, and we found that the label marked B on Exhibit No. 27 was a much plainer and more distinct label, and in getting up our new label we decided to have them like the one marked B, it being much more plain to see the name and to show who the manufact-
482 urer was, and we had the whole line of six-cord thread made to correspond in its labels with that label.

Adjourned for luncheon.

100 Q. What has been the purpose of putting the name Merrick Thread Company upon the labels of its six-cord thread?

(Objected to as immaterial and because the witness is not competent to answer.)

A. To show who the manufacturers of it were.

101 Q. State whether, considering the size of the spools, the name of the company appears as plainly as it well could be made to do upon said labels.

(Objected to as leading.)

A. I think it does.

102 Q. State whether, in your opinion, this means of identifying the Merrick Company's thread is in itself a sufficient means.

(Objected to as calling for a conclusion from the witness.)

A. I should think it was.

103 Q. By what name is the thread known in the market to the trade and the public?

A. Merrick's six-cord; and some ask for the name American, and some have called it the Star thread.

104 Q. State for about how long you have known of six-cord thread on 200-yard spools being known in this country by the name of the maker.

A. Twenty years, and perhaps longer, some of them.

105 Q. Do you know of any instance of the Coats' people or any other spool-thread concern during the time you have been acquainted with the business complaining of the use by any other concern of a black and gold label except in cases where the label bore the same name as the complaining party?

(Objected to as incompetent.)

483 A. I never heard of any.

106 Q. How likely would you have been to know it if there had been?

A. I examined all the cases I could find.

107 Q. Question repeated.

A. I think I should have heard of it.

108 Q. What has been the effort of your company in the direction of obtaining a label which should plainly inform the public that the Merrick Thread Co. made the thread upon which it appears?

A. We had several samples made by different lithographers to determine which was the plainest and would most distinctly show the name of the company; we spent at least a thousand dollars in trying to get them plain and distinct.

109 Q. Did you give this subject your personal attention?

A. I did.

110 Q. Did it ever occur to you or was it ever intimated to you by anybody at that time or has it been since that the Merrick Thread Co. had not a perfect right or were not at liberty to put upon their

200-yard six-cord spools of thread just such labels with just such language upon them as has appeared upon the thread from 1867 to the present date?

(Objected to as immaterial.)

A. It never did and never was.

111 Q. Either from the Coats people or anybody else?

A. No.

112 Q. When was the use of the star adopted in the center of these labels?

(Objected to as immaterial.)

A. When the labels were first made, in 1867 or 1868.

113 Q. And has it been used ever since in that location?

(Same objection.)

484 A. Yes.

114 Q. In the preparation and use of these labels has there ever been any purpose of imitating the labels of any other maker?

A. No.

115 Q. Did any instance ever come under your knowledge of anybody's mistaking 200-yard six-cord thread of the Merrick Co. for the Coats' or that of any other maker?

A. Never.

116 Q. State when you began to emboss the numerals in the wood around the rim of the 200-yard six-cord spools, as shown in Complainants' Exhibit Schedule G.

A. In 1878 or the early part of 1879.

117 Q. Why did you do this?

A. We did it to preserve the number of the thread when the ticket became defaced or lost off, or destroyed on the sewing machine; that was the first and main reason. Then we had another reason, viz., to make a smaller circle, so that the ticket could be placed nearer the center of the spool and true; and another reason was so that a person could tell the number of the thread in any position in which he held the spool.

118 Q. What were your reasons for putting the embossed star between the numbers on the periphery?

(Objected to as immaterial.)

A. When we had the knarls first made to do that work they were made perfectly plain except the figure. We tried them for a short time and found that they slipped, as there was so much smooth space on them, and destroyed the figures. Our mechanic, Mr. Page, said that we must have a bearing between the figures in order to make the knarl work. I told him he could have some cut with the star between the figures, which woul dmake another bearing, as we had always had the star in the center of our ticket. He had them so made and they have remained so to this day; there has been no other change; this is on the 200-yard six-cord thread.

485 119 Q. What information are the numerals intended to convey and what information do they in fact convey to the trade and to the public, whether the numerals appear on the label or on the wooden periphery of the spool and whether they appear upon one make of thread or another?

(Objected to as incompetent.)

A. They describe to the person the size or number of the thread wound on that spool.

120 Q. And when the numerals appear upon the box?

(Same objection and as immaterial.)

A. They describe the same thing—that is, the number of the thread on the spools in that box.

121 Q. What do you mean by number in the last answer?

A. Size.

122 Q. When did you first know of 200-yard six-cord thread in spools being upon the market in this country bearing upon one end black and gold labels with concentric rings, with the name of the maker in the outside ring and with the size of the thread, its quality and length, upon said label, and with some ornamental device embossed upon the periphery of the spool outside of the label referred to?

A. I think I saw them as early as 1852. They were quite common after 1855.

123 Q. State how many different devices you were familiar with as thus embossed outside of such labels.

A. The embossing was of various patterns, and the same makers had different patterns on their make of spools.

124 Q. Whose makes of thread were put upon spools thus ornamented?

A. J. & J. Clark's, Orrs & Macnaught's; I think the Coats', but I would not be so positive about that.

486 125 Q. To what extent was the practice of thus ornamenting the periphery of the spool employed prior to, say, 1869 or 1870 and since?

A. It was quite common up to that time—quite common.

126 Q. How as to its being most usual on six-cord thread?

A. It was used on all the six-cord threads that I first saw that were marked six-cord.

127 Q. Will you produce some examples of what you mean—of such label with such embossment?

A. I produce two such spools of No. 12, five No. 16, one No. 40, three No. 70, one No. 80 of Orrs & Macnaught's thread above referred to. Defendants' Exhibit No. 22, J. & J. Clark No. 50 Thread, is also an example.

(Defendants' counsel states that he will introduce these Orrs & Macnaught spools in evidence when he introduces the case containing them.)

128 Q. State whether Defendants' Exhibit No. 6 is also an example of the same thing.

A. Yes.

129 Q. When did you first know of the size of the thread being designated by a numeral by stamping or embossing upon the periphery of the spool head?

A. We have stamped the number on the spool heads of our thread since 1867.

130 Q. Please produce a spool showing how it was done in 1867.

A. I produce a spool of thread.

Examination adjourned to May 22, at 10.30 a. m.

487 NEW YORK, *May* 22, 1886—10.30 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of examination of LYMAN R. HOPKINS:

131 Q. State whether from time to time the company has continued to mark some of its thread with the size of the thread as shown on the spool produced, and up to when.

A. They have, and up to the present time.

132 Q. What does W. and G. on the other end of the spool mean, and why was it put there?

A. The thread was made for the Wilcox & Gibbs Sewing Machine Company.

133 Q. State whether it has been the practice of thread-makers to make threads for certain concerns and in some way connect the name of the customer with the article.

A. It has been with us.

(Defendants' counsel puts in evidence the spool produced by the witness, and it is marked "Defendants' Exhibit No. 28, Merrick's Early Spool with Stamped Number, W. H. K., notary.")

134 Q. Give approximately the date of the spool and the marking which you have produced, Defendants' Exhibit No. 28.

A. That spool was manufactured in 1875 or 1876, but we had done the same kind of work from 1867, and have continued to do it down to the present day.

135 Q. You include the marking in your term manufacture?

A. Yes.

136 Q. Did you or any member of your company know that the Coats people were putting the size of the thread on the wooden periphery of the spool before your company put it on in 1878 or 1879?

(Objected to as far as question calls for the knowledge of others than the witness.)

488 A. I presume they did, as Mr. Rider, the official clerk of the company, wrote Mr. Conant, who is in alliance with

J. & P. Coats, to know where he could get the knarls made to emboss the spools.

137 Q. Have you that letter; if not, have you a copy of it?

A. I have a copy of it.

138 Q. Will you please produce the copy and read it, and make the same a part of your answer?

A. I produce it, and it reads as follows:

"MAY 11, 1878.

H. Conant, Pawtucket, Rhode Island.

DEAR SIR: Will you have the kindness to inform us where we can get the dies made for embossing the ends of spools such as are used on the Coats' thread spools, and much oblige,

Yours truly, MERRICK THREAD CO.,
Per C. W. R."

139 Q. Do you recognize the handwriting of Mr. Rider in that letter?

A. Yes.

140 Q. State what, if any, answer was returned by Mr. Conant to that letter, and produce the answer if you have it.

A. We received a letter from him in relation to the matter, dated May 13, 1878, reading as follows:

"PAWTUCKET, *May* 13, 1878.

"Messrs. Merrick Thread Co.

"GENTS: In reply to your 11th, just to hand, we don't know of any parties where you can get those dies for embossing spools on the end 'like Coats' thread spools' made for you.

"The Conant Thread Co. make all used on their work, but they would make for other parties only on order from J. & P. Coats or their agents in N. Y., Messrs. Auchincloss Bros.

"Yours truly, H. CONANT."

489 141 Q. You speak of this Mr. Conant's alliance with the Coats people. State generally what you mean by that.

A. Mr. Conant spoken of is the head manager of the Conant Thread Co., which manufactures thread for J. & P. Coats in this country.

142 Q. State whether this Mr. Conant was the patentee of the design patent for embossing the numerals on the wooden periphery of the spools, dated 1870, and marked Defendants' Exhibit No. 12, Coats' Spool Head Design Patent.

A. He was.

143 Q. State whether or not at the date of this correspondence between your company and Mr. Conant the said patent had expired.

A. It had expired more than a year before.

(Defendants' counsel offers in evidence a copy of the Rider letter, the Conant reply, and they are marked respectively "Defendants' Exhibit No 29, Letter Rider to Conant," and "Defendants' Exhibit

No. 30, Letter Conant to Rider." Defendants' counsel also offers in evidence a certified copy of the assignment of said design patent, and it is marked "Defendants' Exhibit No. 31, Assignment of Design Patent, W. H. K., notary.")

144 Q. Had you or your company any idea that you had not a perfect right to put the numbers designating the sizes of your thread on the wooden periphery of the spool outside of the black and gold label used by you in the manner that you did in all respects?

A. We did not doubt but what we had a perfect right to do so.

145 Q. Why did you so conclude?

(Objected to as immaterial.)

A. Because we had used numerals on the wooden ends of the spool continuously from 1867. We supposed that any thread-maker had the right to use numerals on the wood to designate the size of the thread on the spools in any shape or manner.

490 146 Q. And had your company also become aware that the Conant design patent had expired?

A. I couldn't say that we had just at that time.

147 Q. When did you first get information, and how, of a claim on the part of the Coats people to any exclusive right in the embossment of the number of the thread on the wooden spool head?

A. In August, 1879, I received a letter from Varnum & Harrison, attorneys for J. & P. Coats, in relation to that matter.

148 Q. Please make that letter your answer to this question.

A. It reads as follows:

DEFENDANTS' EXHIBIT NO. 32, COATS' LETTER TO MERRICK NO. 1.

NEW YORK, *August* 12, 1879.

Lyman R. Hopkins, Esq., president Merrick Thread Co.

DEAR SIR: The attention of our clients, Messrs. J. & P. Coats, manufacturers of spool cotton and cotton thread, has just been called to certain spools now used for spool cotton, said to be manufactured or sold by you. We have before us several spools of your black cotton thread. The spool heads have an embossed peripheral border of natural wood, including among the ornamental designs numerals corresponding with the number which is usually contained on a label pasted on the end of a spool of such thread. One sample bears the numerals "50," and the spool head is an exact fac-simile of that used by J. & P. Coats on spools of similar thread, except that on the sample before us no name of manufacturer is inserted in the inner circle where the words "J. & P. Coats best six-cord" appear in the original. Another sample bearing the numerals "30" has a somewhat different pattern of embossment, but is still of the same general character as the spool heads used by J. & P. Coats, and

491 strongly resemble them. On this spool appear the words "Merrick Thread Co." in the inner circle. The reverse end

of the spool contains, in a circle, the words "warranted 500 yards," in the same general type and style as on Coats' spools.

Messrs. J. & P. Coats were the first manufacturers of cotton thread who used as a distinctive mark for their spool cotton an embossed spool head containing numerals corresponding with the number designating the quality or character of the thread, and their wares have become well known throughout the country by this mark, so that most of the purchasers of spool cotton, upon seeing an embossed spool head of the character stated are led to believe that the thread wound upon the spool is that manufactured by J. & P. Coats.

Messrs. J. & P. Coats are the owners of a patent issued to H. Conant, April 5, 1870, for a design for spools of thread "for preserving the number of the cotton thread with which the spool is wound after the label has been destroyed, by embossing such number on the spool head."

They are also the owners of a trade-mark for spool cotton registered February 9, 1875, being a peculiar spool head, an essential feature of which is an embossed peripheral border of natural wood, including among its ornamental designs the same numeral as that displayed on the centre label.

Upon comparison of the sample spools of your thread now before us, we find that not only have you adopted an embossed spool head resembling in all respects the spool head of Messrs. J. & P. Coats, but you have also in one case neglected to put your own name upon the spool head in order to distinguish your manufacture from that of our clients.

After a careful examination and consideration of the matter Messrs. J. & P. Coats are reluctantly led to believe that the spool heads above referred to, as now used by you, have been used with the object and effect of leading purchasers of your spool
492 cotton to believe that the thread on such spools was of the manufacture of J. & P. Coats, and of thereby profiting by the well-established, high reputation of the thread of the latter manufacturers.

Messrs. J. & P. Coats regard the use of such spool heads by any other manufacturer than themselves as an infringement of the patent and registered trade-mark above referred to, and an injury to their business.

We are therefore requested by them to bring the matter to your attention, and to request you to refrain from any further use upon your spools of the embossed spool heads, of the design above referred to, for the reason above stated.

We trust that you will see the propriety of acceding to our request, as we have no desire to take legal proceedings unless absolutely unavoidable to protect our rights.

Yours very truly, VARNUM & HARRISON,
Attorneys for J. & P. Coats.

149 Q. State what reply, if any, you made to that letter, and if you have not the original letter will you please make a copy of it a part of your next answer?

A. I replied to that letter on August 19th, 1879, and I produce a copy of the reply, which reads as follows:

DEFENDANTS' EXHIBIT No. 33, MERRICK'S LETTER TO COATS.

HOLYOKE, MASS., *Aug.* 19, 1879.

Varnum & Harrison, attorneys for J. & P. Coats, No. 110 Broadway, N. Y.

GENTLEMEN: Your favor of the 12th inst. came duly to hand and has our careful attention. In reply would say that we never designed or desired, in embossing our spool heads, that any one buying them would think or imagine the thread was manufactured by Messrs. J. & P. Coats. On the contrary we designedly made
493 the embossing of a different pattern from that of theirs. In relation to the spool you have of ours that has not got our name on, it happened in this way. Our agent in New York was in a hurry for some of the thread, and the die for stamping the same was not ready and we sent a few dozen before it arrived; but for that the name Merrick Th'd Co. would have been on every spool, as it is now. In relation to embossing spool heads in our spool cotton we supposed we had a perfect right to do so, as our Mr. Merrick made spool cotton with embossed heads thirty years ago, and we have other spools now before us made with embossed heads combining the number of thread with the embossment made before Mr. Conant's patent was granted. In relation to stamping or embossing the number of the thread and the number of yards on each spool on the ends of the spools, we have always done so from the time we commenced manufacturing spool cotton.

Now, with these facts before me I cannot see how Messrs. J. & P. Coats can claim no one but their company has the right to manufacture spool cotton with embossed spool heads. If there is anything in the combining of the number and embossing in the embossed circle that they have a patent for, then in that case we certainly would have no right to so combine them, but we certainly have the right to emboss or stamp the number and length of yards on the spool heads, as we always have done; and so far as the number in combination is concerned we certainly have the right to do it as Mr. Merrick did it thirty years ago. In conclusion allow me to say we have no wish or desire to benefit ourselves from the reputation of J. & P. Coats, but propose to stand on our own reputation. We will look into the matter at once, as we do not wish to do anything in relation to our spool cotton but what we have a perfect right to do.

Yours very truly, L. R. HOPKINS, *Pres.*

P. S. I should have replied to this sooner but was out of town when it came to hand.

494 150 Q. Please state what next occurred.

A. On September 17th, 1879, I received another letter from Varnum & Harrison in relation to the matter, reading as follows:

DEFENDANTS' EXHIBIT NO. 34, COATS' LETTER TO MERRICK NO. 2.

NEW YORK, *Sept.* 17, 1879.

L. R. Hopkins, Esq., president of Merrick Thread Co., Holyoke, Mass.

DEAR SIR: Your letter of August 19th was duly received, but owing to the absence from the city of our Mr. Varnum, who had the matter in charge, we have been unable to reply to it before. We are glad to receive the assurance that you have no desire to benefit yourselves at the expense of your rival manufacturers, and we feel assured that after due consideration of the matter you will be disposed to avoid even the resemblance of an infringement upon the business or any business emblem of our clients.

We know of no manufacturers embossing spool heads and using them upon goods in market prior to J. & P. Coats, nor of any who are now using them, except certain parties infringing the rights of J. & P. Coats, all of whom, except yourselves, have promptly discontinued the practice when the matter was brought to their attention.

One of the trade-marks of J. & P. Coats contained, as an essential feature, a spool head having an embossed peripheral border of the natural wood, including among the ornamental designs the numerals designating the thread upon the spool. Messrs. J. & P. Coats claim the right to retain for their use a spool head embossed with ornamental designs combined with the numerals aforesaid, and in their judgment it makes no difference in respect to an infringement if the ornamental designs are slightly varied from that in general use by them, inasmuch as few purchasers exercising ordinary
495 caution either notice or retain an exact recollection of the minor details of the design, or would notice whether there were a few lines or dots more or less on the embossment. As we stated in our last letter, Messrs. J. & P. Coats' thread has become generally known throughout the country to the trade and purchasers generally by an embossment upon the spool heads of the character described, and the manufacturers therefore deem it important for them not to have other manufacturers adopt a design so nearly like it as to be with difficulty distinguishable to the average purchaser.

We therefore ask that you pay due regard to the request of our clients, and refrain from using the combination above referred to.

Hoping to hear further from you, we remain,

Yours truly, VARNUM & HARRISON,
Attorneys for J. & P. Coats.

(Defendants' counsel here puts the three letters in evidence, and they are marked "Defendants' Exhibit No. 32, Coats' Letter to Merrick No. 1, W. H. K., notary;" "Defendants' Exhibit No. 33, Merrick's Letter to Coats, W. H. K., notary;" "Defendants' Exhibit No. 34, Coats' Letter to Merrick No. 2, W. H. K., notary.")

151 Q. Defendants' Exhibit No. 32 refers to some spools of thread as not bearing the name of the Merrick Company. Please state how it happened that any such spools were issued without the name of your company upon them, and state to what extent this was done.

A. We had just commenced to make 500 yards six-cord thread, and our agent in New York, Mr. Palmer, was in a great hurry for some of that thread. We had ordered the die made to stamp the name of the company on the end of the spool, but had not received it at that time, and we sent Mr. Palmer a few dozen, not over twenty, that did not have the Merrick name on them.

496 152 Q. Did your company ever put a label on a single dozen or spool of six-cord thread without the words "Merrick Thread Co." or the words "American Thread Company" appearing upon said label, all as conspicuously and in other respects as they appear on Defendants' Exhibit No. 27, Card of Defendants' Black and Gold Labels?

A. We never used any other label on six-cord thread except what appears on the Exhibit No. 27, Card, except, of course, the number designating the size of the thread varies.

153 Q. In your letter to the Coats people, Defendants' Exhibit No. 33, you stated that you would look into the matter complained of. Did you do so; and, if yes, to what extent?

A. We sent to Washington and got a copy of the Conant patent referred to in their letter and a copy of the trade-mark, and we found that the patent had expired over a year previously, and that they had taken all that was novel and descriptive and useful in the Conant patent and had combined it with their black and gilt label and registered it as a trade-mark.

(Complainants' counsel moves to strike out all that part of the answer beginning with the words "and we found" down to the end as giving conclusion of law of the witness and as not responsible.)

154 Q. When you had received and examined copies of the Conant patent and the trade-mark referred to, what did you find?

(Objected to as calling for conclusions of law from the witness.)

A. I found as I have stated in my answer last above.

155 Q. You say in your letter of reply, Defendants' Exhibit No. 33, that "our Mr. Merrick made spool cotton with embossed heads thirty years ago." Did you know this of your own knowledge?

497 A. I did not. He told me that he had.

156 Q. Now please state what you did in consequence of the second letter received from complainants' attorneys, marked Defendants' Exhibit No. 34.

(Objected to as immaterial.)

A. When I received the second letter I talked the matter over with Mr. Merrick and told him that I better go and see them and explain the matter to them. Very soon after that I called at the office of Varnum & Harrison, on Broadway, and inquired for Mr. Varnum. The person present told me he was not in the country.

I then told the person I was talking to that I had come to see them in relation to the matter spoken of in their letter. I told him I considered we had a perfect right to use the numerals round the ticket, as we were doing, and I reiterated the same things that were in my letter of reply to them.

157 Q. When did you next hear anything from the plaintiffs or anybody representing them on the subject of the trade-mark or patent referred to in said correspondence?

A. I never heard another word until the commencement of the suit.

158 Q. And had you during all that period continued to emboss the numeric sizes of the thread, together with the star, upon the wooden periphery of the spools of thread of your manufacture, in connection with the black and gold label, as shown in the second row of labels on Defendants' Exhibit No. 27?

A. We never made any change, but we continued to put it on the same as we had and the same as we do now.

159 Q. Will you please state what pains you have taken to identify your manufacture with the maker—that is, the Merrick Thread Company—and illustrate your answer by producing articles which will show your meaning?

498 A. We put our name plainly on the boxes and on the spools, on the ten-dozen packages, on the cases containing the thread. We also furnish a cabinet, with our name plainly upon it; also counter wrappers; also show-cards, and the name of the company is on the thread when it leaves the factory and continues to be on it until it is consumed. I produce articles as examples of what I have above referred to.

(Defendants' counsel offers the said articles in evidence, and they are marked as follows: "Defendants' Exhibit No. 35, Cabinet, W. H. K., notary;" "Defendants' Exhibit No. 36, Show-Card No. 1, W. H. K., notary;" "Defendants' Exhibit No. 37, Show-Card No. 2, W. H. K., notary;" "Defendants' Exhibit No. 38, Advertising Cards, W. H. K., notary," being nine in number; "Defendants' Exhibit No. 39, Show-Card No. 3, W. H. K., notary;" "Defendants' Exhibit No. 40, Ten-Dozen Wrapper, W. H. K., notary;" "Defendants' Exhibit No. 41, Counter Wrapper, W. H. K., notary;" "Defendants' Exhibit No 42, Color Card, W. H. K., notary;" "Defendants' Exhibit No. 43, Box Containing One Spool and Advertisement, W. H. K., notary.")

160 Q. Please state what use is made by the company of the cabinet, Defendants' Exhibit No. 35, and whether you make more than one size, and whether all are with equal plainness marked with the name of the company.

A. The cabinets are furnished free with the first purchase of 200-yard thread for the purpose of keeping the Merrick thread in to retail from. We make them in three different sizes, of 26 dozen, 50 dozen, and 100 dozen. The name is the same on them all—the Merrick Thread Co.

161 Q. Please state what use is made by the company of
499 the show-cards, Defendants' Exhibits Nos. 36, 37, and 39, and state whether there are other sizes and shapes of these show-cards.

A. They are furnished to purchasers with our thread free, to hang up in different places in their stores to designate that they sell Merrick Thread Company's six-cord thread; they are made of different sizes and of various shapes.

162 Q. Please state what use is made by the company of the advertising cards like the nine that are produced and marked Defendants' Exhibit No. 38.

A. They are furnished free to each purchaser of our six-cord 200-yard thread for them to distribute among their customers.

163 Q. State what use is made by the company of the ten-dozen wrapper, Defendants' Exhibit No. 40.

A. They are used to put up ten boxes, each containing a dozen spools of our 200-yd. six-cord spool thread.

164 Q. Please produce one of such boxes containing a dozen thread and state whether that represents your invariable system of putting up and marking the thread.

A. It is all put up in that exact style; I mean our six-cord 200-yard thread.

(Defendants' counsel puts the box of thread in evidence, and it is marked "Defendants' Exhibit No. 44, One-Dozen Box Merrick's Six-Cord 200-Yds. Thread, W. H. K., notary.")

165 Q. Please state what use is made by the company of wrappers like Defendants' Exhibit No. 41, Counter Wrapper.

A. They are furnished in quantity free with the first purchase of 200-yd. six-cord thread and duplicated if they require it.

166 Q. What do the retailers use them for?

A. They are used for doing up small packages of various kinds of goods, whether spool thread or other things.

167 Q. Please state what use is made by the company of Defendants' Exhibit No. 43.

500 A. We furnish them to be distributed free to customers by retailers who buy considerable quantities of thread.

168 Q. State whether or not you have learned by experience and familiarity with the trade that the Exhibits Nos. 35 to 43, inclusive, are in fact used largely as the company designs they shall be.

A. They are so used.

169 Q. State whether the other leading thread-makers take similar means of keeping their name prominently before the public in connection with the thread.

A. They do as far as I know.

Adjourned to May 24, 1886.

NEW YORK, *May* 24, 1886—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of examination of LYMAN R. HOPKINS:

170 Q. State in what quantity the cabinet, show-cards, wrappers and counter wrappers, and advertising cards have been sent out to the public by the Merrick people.

A. We have sent out cabinets by the thousands, counter wrappers by the millions, show-cards by the millions, signs by the thousands; at least thirty thousand of the signs were sent out—that is, the velvet show-cards and the frame show-cards.

171 Q. Will you explain how the words American Thread Company came to be used upon some of your thread?

A. When the company was formed, in 1865, Mr. Johnson, the former president, wished to name the company the American Thread Co; he said he wished to sail under the broad banner of America; he said he felt a pride in that name; and we had quite a long
501 struggle whether it should be called the American Thread Company or the Merrick Thread Company; but it was finally decided at that time that the name should be the Merrick Thread Co. When we commenced to make 200-yard six-cord thread, in 1867, two years later, Mr. Johnson still stuck for the American name, and to gratify him and to have the six-cord 200-yard distinct from the three-cord, which had the Merrick name on it, we consented to put the name American Thread Company on the six-cord thread at that time.

172 Q. Will you please produce a couple of boxes of thread illustrating what use was made of the name American Thread Company both upon the spools and the boxes?

A. I produce them. This thread was manufactured and boxed before the name was changed to the Merrick Thread Co.

(Defendants' counsel puts in evidence the two boxes, and they are marked respectively "Defendants' Exhibit No. 45, Merrick Thread with American Label No. 1, W. H. K., notary," and "Defendants' Exhibit No. 46, Merrick Thread with American Label No. 2, W. H. K., notary.")

173 Q. What experience have you had in selling thread to consumers and in becoming acquainted with the way in which consumers buy their thread?

A. I have kept a retail store where thread was retailed by the spool. I have bought thread at retail, and I have inquired of a great many retail dealers to find out how customers ask for the different brands and makes of spool cotton. In my own experience they always ask for it by the name of the maker, such as Willimantic, Orrs & Macnaught, Kerr's, Merrick, Coats', and it was the same with Clark's until there were two or three Clarks, and those companies attached some other symbol, such as O. N. T., Mile-

end, C. S. I., to get their thread to be known more or less by
502 these symbols, but their name still sticks by it, and some ask for Clark's Mile-end, Clark's O. N. T., and there are a few (it has been advertised so much and so long) who ask simply for O. N. T. or Mile-end.

174 Q. To what extent do the makers of these threads associate their names with their manufacture?

A. It appears on all their spools, all their boxes, all their cases, advertising cards, show-cards, etc.

175 Q. As a manufacturer of spool thread, familiar with the market and trade in it, state whether it is a fact that the name of the maker appears in connection with the thread from the time it is made to the time it is used, and whether the name of the maker is in fact the name of the thread.

(Objected to as leading.)

A. It does appear with it from the time it is made till it is used, and it is the name of the thread.

176 Q. State whether some thread is purchased by consumers who do not care what they have; and, if you say such is the case, state how such purchases are made.

A. There are some people who have no particular preference for any brand, who ask simply for a spool of six-cord thread.

177 Q. State whether some of the makers have their name upon labels upon both ends of the spool.

A. Some of them do.

178 Q. Will you please produce a card with the reverse labels of some of the leading makers of 200-yard six-cord thread affixed upon it, and state how long the Merrick Thread Company has used upon such thread the label appearing upon that card as theirs?

A. The label which the Merrick Thread Co. use appears second from the bottom on the card which I now produce. It has been used since about 1878, when the change was made from the American to the Merrick on the black and gold label.

503 179 Q. What sort of label was used by the Merrick Thread Co. on the reverse of the 200-yard six-cord thread before the change was made in 1878?

A. It read The Standard Thread.

180 Q. Can you produce a spool of thread illustrating the use of those words?

A. It is contained on the spools in the box marked "Defendants' Exhibit No. 45, Merrick Thread, with American Label No. 1."

181 Q. State what other reverse labels appear on the card which you produced in answer to 178 Q.

A. Reverse label of Orrs & Macnaughts', J. & P. Coats', Geo. A. Clark's, Kerr's, J. Clark Jr.'s, in the order mentioned.

182 Q. How did the old J. & J. Clark reverse label compare with the first two labels on that card?

A. I should say that they were as nearly alike as they could make them with the exception of the names; the general style, the letters and the form of the wording are almost the same.

183 Q. During the long period that thread of the best quality in 200-yard lengths, to your knowledge, has been put upon spools with the labels of black and gold in concentric rings, how have the different makes of thread been practically distinguished from each other?

A. They have been known and asked for by the name of the maker.

184 Q. State whether, in your opinion, it is just as easy to determine the maker of the Merrick 200-yard six-cord thread from their name upon the label as it is to determine the size of the thread upon the spools.

A. I should think it was much more easy to see the name than it was the numeral designating the size, the name being in black and taking up much more space on the ticket than the numeral.

185 Q. Who is it that sees the spools of thread with their labels and marks?

504 A. The purchaser generally looks to see that she gets the right number and make if she prefer any particular make.

186 Q. What should you say of a customer who, wanting a spool of Coats' thread, should accept therefor a spool of Merrick's?

(Objected to as immaterial and hypothetical.)

A. I should say they did not look at it; if they had they would have seen the name.

187 Q. Are you acquainted in a general way with the suits that have been brought in this country by spool-thread makers against people for infringement of trade-marks or trade-rights in labels or other designating marks?

A. I have examined all that I could find.

188 Q. Do you know of any such suit in which the burden of the infringement charged was not that the complainants' name had been taken?

(Objected to as leading; also as incompetent and as immaterial.)

A. In all the cases that I have examined it has been the case that the name of the complainant has been used and, so far as I could see, made the main ground of the complaint.

Adjourned for luncheon.

189 Q. Please state what are the prominent characteristics of the Merrick Company's label as distinguished from Coats label and trade-mark in suit.

A. The Merrick Thread Company's label has the name prominent in the outside circle; it has the star prominent in the center, where the Coats people have their number; there is the absence of the 200 yds. on it, which the Coats people have, and the "best six-cord" is in very small type near the center of the label, whereas the Coats is in large type on the outside circle; the number on the Merrick's ticket is on the outer edge of the ticket, whereas the Coats number is in the center of the ticket.

505 190 Q. State for how long and how universally the star you have spoken of has been identified with the Merrick Thread Company's six-cord and what various ways have been resorted to to connect the two together.

A. It has been on all of our tickets for six-cord thread since we got them up in 1867; it has been on the boxes and the signs, showcards, and been connected with our trade-mark ever since we made six-cord thread.

191 Q. State whether in your opinion this star furnishes a ready means for identifying your thread even for those who are ignorant of how to read.

(Objected to as incompetent.)

A. I should think it did, for any one can see it.

192 Q. State how the shape of the Merrick spool of six-cord 200-yard thread compares with that of the Coats of the same number.

A. It is longer in all of the numbers and very much longer in the medium numbers, which are most used.

193 Q. State whether any other maker that you know of has adopted this designating feature.

(Objected to as leading.)

A. They have not so far as I know.

194 Q. State whether in your opinion to a person accustomed to handling Coats' spools that difference is so great in the numbers most generally used as to furnish a mode of distinguishing the two without reference to any of the labels or marks, and state whether your opinion is founded on finding such to be the case.

(Objected to as incompetent.)

A. I should think they could readily be distinguished, and we have had letters from several parties who claim that purchasers thought our spool of cotton was put up for basting cotton, being on long spools.

506 195 Q. What do you mean by basting cotton?

A. I mean that basting cotton is a cheaper cotton, some made of two-cord and some of three-cord.

195½ Q. With what number of Coats' thread does Merrick's number 60 correspond as to length of spool?

A. It is a trifle longer than Coats' No. 46.

196 Q. What number of the 200-yard six-cord thread is used in the greatest quantities?

A. Nos. 50 and 60.

197 Q. State whether spool heads such as are made exhibits of by complainants, Schedule C and G, are an article of sale to any one.

A. I never heard of spool heads being sold in the market.

198 Q. State whether it is not the entire spool with both its heads and the labels and marks upon it and with thread upon the spool that goes to the consumer.

(Objected to as immaterial.)

A. It is.

199 Q. State how the price paid by the consumer for the Merrick six-cord 200-yard thread compares with the price paid for Coats'.

A. They are both retailed at five cents a spool.

200 Q. And they have been for years?

A. Yes.

201 Q. How, if at all, can it be said that this Merrick's thread is sold more cheaply than Coats'?

A. The Merrick Thread Company have made it a practice to sell directly to the retail dealer instead of through the jobbing trade, and have given the retail dealer a portion of the profit which the jobber would receive if it had gone through his hands; the Coats people, as I understand it, have generally sold through the jobbers so that the retail dealer would get the Merrick thread a little cheaper than he would the Coats, which was purchased through jobbers.

507 202 Q. State some of the difficulties which the introducer of a new thread has had to encounter from the time your company commenced its business up to the present time.

(Objected to as immaterial.)

A. It is a very hard job to introduce a new brand of thread; we have had to advertise and give away large quantities of spool thread to get our name established as makers of spool cotton; we have had to send traveling men through the different States and get the people to try samples of our thread; we have had to overcome a great deal of the prejudice that was formerly had in favor of foreign thread; people have told us that we must not put the name American upon our spools; that it would hurt the sale of it.

203 Q. What were the advantages enjoyed by the foreign thread-makers which made competition all the more difficult? I refer to the Clark Thread Company and the Coats people.

A. The Coats and the Clarks for quite a long time manufactured their spool thread that was sold in this country in Scotland, and the people had come to think that a first-class spool cotton could not be made in this country.

204 Q. How as to their advantages in way of capital and skilled labor and experience in the art?

(Objected to as immaterial.)

A. The manufacture of fine yarns, which are used in the manufacture of spool thread, was begun in England quite a long time before it was in this country; capital was cheaper; there was more of it; the laborers had become more skilled, and consequently at that time the best brands came from Europe.

205 Q. How does the Merrick Nos. 8 to 100 200-yard six-cord thread compare in quality with that of Coats'?

A. We think Merrick's is better.

508 206 Q. Will you please state what are the characteristics of the best six-cord thread?

A. Strength, smoothness, elasticity and uniformity of twist, and the best material.

207 Q. State whether you have made and how often tests of the comparative quality of the Merrick and the Coats' thread, and whether the results of those tests bear you out in the opinion which you hold that the Merrick thread is superior to the Coats'.

A. I have made tests for the last ten years and some before of all of the six-cord makes of spool cotton and I have found ours stronger than and as smooth and as even and as uniform in twist as any of them; we use the best cotton on the market and take all the pains that we possibly can to make it strong, uniform, and smooth.

208 Q. What is it that to a great extent determines the strength of the thread?

A. Sea island cotton makes the strongest thread; the uniformity of the spinning and the twisting gives it the strength.

209 Q. What was the conclusion you arrived at resulting from your examination and tests as to which the Merricks or the Coats used yarn more nearly corresponding with the size called for by the number describing the size of the thread?

A. I think ours was the nearest.

210 Q. State whether the Merrick 200-yard thread of numbers finer than 100 is or not superior to the Coats' thread of numbers finer than 100, and state why.

A. I think it is because ours is made of six-cord and theirs is made of three-cord.

211 Q. For what purpose are these fine numbers used in addition to the purposes mentioned by Mr. Ives and Mr. Russell, complainants' witnesses?

A. They are used quite largely in making fine ladies' collars and cuffs, stitching fine linen bosoms, and in sewing fine muslins generally.

509 212 Q. Is it used upon the sewing machines and is it so labeled upon the reverse label of the Willimantic thread in the fine numbers?

A. It is used on sewing machines and is so labeled on the Willimantic thread in the fine numbers.

(Defendants' counsel offers in evidence the card produced in answer to Q. 178, and it is marked "Defendants' Exhibit No. 47, Reverse Label Card, W. H. K., notary.")

213 Q. In the course of your examination you have referred to the leading makers of thread during the time that you have been familiar with the business of making and marketing thread. Will you produce samples of these various makes of thread arranged in the order of time in which they appeared upon the market as you understand it?

A. I produce a case containing samples of such makes of J. & J. Clark, which I understand to be the oldest. I could only produce one spool. Next comes J. & P. Coats, then Orrs & Macnaught, then

John Clark, Jr., then another Clark, then Willimantic, then Merrick, and then Kerr's. J. Clark & Co., I cannot state exactly where that comes in. I would also say that John Clark Jr.'s thread, under some form of label, was probably here before Orrs & Macnaught. The case also contains samples of the Williston, the Hadley Co., and the A. T. Stewart & Co., heretofore mentioned by me.

(Defendants' counsel puts the said case in evidence, and it is marked "Defendants' Exhibit No. 48, Chronological Exhibit of Thread Manufacture, W. H. K., notary.")

Adjourned to May 25, at 1 p. m.
Adjourned to May 28th, at 11 a. m.

510 NEW YORK, *May* 28, 1886—11.30 a. m.

Met pursuant to adjournment.
Present: Counsel as before.

Continuation of direct examination of LYMAN R. HOPKINS:

214 Q. When the Merrick Company adopted their method of designating their 200-yard six-cord thread, what did they use that was old and well known and free to anybody to use as you understand it, and what of their own did they put with these old marks?

A. We adopted the well-known article for holding the thread—that is, a spool; also the well-known gold and black label with concentric rings smaller than the spool head and circular in form. We put this label in the well-known place. We used on the label the well-known words designating the quality (best six-cord); also numerals designating the size. With these old marks we adopted a new name; also we adopted a star in the center of the label, and the words "Standard" or "American Standard;" our thread was and is put up on longer spools than other makers use.

215 Q. Which of these distinguish the thread from any foreign brand, whether Coats' or anybody else?

Q. They all of them do.

216 Q. Which of them distinctly identify the thread as manufactured in this country?

A. The word "American" and the star.

217 Q. You say that you adopted a new name. Where did you put that name?

A. We put it in the usual place, on the outside of the ticket.

218 Q. What do you understand to be descriptive in the spool heads and their marks as shown in Complainants' Exhibit Schedule- C and G, and what do they describe?

A. The numerals around the periphery of the spool de-
511 scribe the size of thread wound upon that spool; the black and gold label, with concentric rings, circular in form, is a badge of the best thread; the words J. & P. Coats designate the maker of the thread; the words best six-cord designate the quality of the thread; the words 200 yards designate the length of the thread; the numeral in the center also designates the size of the thread; on

Schedule G the numerals on the periphery designate the size of the thread; the black and gold label is a badge of the best thread; the words "Merrick Thread Company" show that it is our thread; the words "best six-cord" designate the quality, and the numeral on the edge of the label designates the size: the star in the center has been identified with our six-cord thread from the time we commenced to make it.

219 Q. State why the star and the word "American" and the eagle (appearing upon the boxes and elsewhere) have been so universally used by you.

A. They have been used to designate that the thread was manufactured in this country and to mark our thread.

220 Q. You mentioned some of the difficulties encountered by a new manufacturer undertaking to put a new thread upon the market. State whether, in your opinion, the difficulty of putting a new six-cord thread upon the market would be increased provided the maker should fail to use the circular black and gold label with concentric rings upon one end of the spool.

A. I think it would be about impossible to introduce a new six-cord thread without using a black and gold label of the usual form.

221 Q. State whether your name, your star, and your eagle and your "American Standard," as distinguishing marks of the Merrick Company's thread and as appearing upon your cabinets, signs, showcards, boxes, advertising cards, labels, etc., go before the eyes of the consumer of the thread as well as the trade.

512 A. They do, and we furnish them free for the purpose of distributing in the families and amongst all the people who consume the thread.

(Question objected to as leading and also as calling for a conclusion of law.)

222 Q. Of the concerns that have undertaken to found and carry forward in this country new manufactures of thread, state how many, to your knowledge, have survived and how many have either failed utterly or failed to attain any considerable hold upon the market.

A. I know of but two makers of six-cord thread out of about eight or ten that have survived in this country; I refer to the Willimantic Thread Company and to the Merrick Thread Company as those who have survived.

223 Q. When did the Coats people begin their branch of manufacture in this country through the Conant Co. and when the Clarks through the Clark Co. at Newark?

A. I think the Conant Thread Co. was started about the year 1866 and the Clark Thread Co. about the year 1865; that's my best recollection.

224 Q. Will you please examine the boxes in which the complainants put up their thread, the spools upon which it is wound, the advertisements by which publicity is given to it, and the bill-heads which accompany its sale as they appear by the exhibits herein, and state whether persons exercising such care as is usual among con-

sumers and also in the trade would or would not believe that all the 200-yard thread of complainant- is six-cord—that is, from Nos. 8 to 200?

(Objected to as incompetent.)

A. I should think that they would for the following reasons: All of their boxes below the number 100 have the advertisement on the flap inside the box, "J. & P. Coats' best six-cord spool cotton, white and black, 8 to 200; brown and assorted colors, 8 to 100;" on
513 these and on the box No. 110 it says on the cover, "Best six cord cotton for hand and machine;" on the bottom of the boxes it also says, "Best six-cord spool cotton;" the next number, 120, is put up in the same general style; on the cover of the box the words "best sewing cotton" are substituted for the words "best six-cord," in the same general style of type; on the bottom of the box No. 120 are the words "J. & P. Coats' best six-cord spool cotton," and all of the boxes from 8 to 200 have their well-known symbol, to wit, the lion and the eagle, which they advertise all over the country as the trade-mark for the United States for their six-cord thread; they have this symbol on the top and the bottom of the boxes.

Adjourned for lunch.

The spools contained in box No. 110 have upon them a black and gold label in the same general style, with the words J. & P. Coats, the same as in the coarser numbers; the only difference is that the words "best spool cotton" are substituted for the words "best six-cord." The spool has an embossing around the label, but the numeral is left off. The reverse label is an exact fac-simile except the number, and all of the higher numbers up to and including 200 are the same as the 110. In Defendants' Exhibit No. 8, Coats' 1883 Advertisement, I find the following notice: "J. & P. Coats' best six-cord spool cotton in 100 dozen cases; white solids in 100 dozen cases, 8 to 100; 10 dozen parcels, 8 to 200." I see by Defendants Exhibit No. 14, Coats' Bill-Head No. 2, a bill of 160 dozen of thread, some of which, as appears from the 162d answer of Mr. Auchincloss, complainants' witness, was of a number finer than 100, and all charged at one price and described as best six-cord. I also produce a bill of goods bought by George P. Baldwin & Co. for an assorted case of J.
& P. Coats' best six-cord 200-yd. thread, from 8 to 150, billed
514 as all six-cord, the price charged being the price for six-cord.

(Defendants' counsel offers said bill in evidence, and it is marked "Defendants' Exhibit No. 49, Coats' Bill-Head No. 3, W. H. K., notary.")

225 Q. What do you find on the inside flap of the box of thread produced by complainants and marked "Coats' three-cord samples No. 16," being No. 120 thread?

A. "J. & P. Coats' best six-cord spool cotton, white and black, 8

to 200; brown and assorted colors, 8 to 100," and their trade-mark for the United States as best six-cord.

226 Q. How do you find the thread described on the bottom of these boxes of complainant- containing thread from 8 to 200, inclusive?

A. As best six-cord.

227 Q. What is the best thread?

A. Thread made of six cords.

228 Q. What meaning does the word "best" in the words "best spool cotton" convey to the consumer as used upon these 200-yd. spools by the Coats people?

(Objected to as incompetent.)

A. That it is made of six cord.

229 Q. State whether, in your opinion, the change from the words "best six-cord" to the words "best spool cotton" upon the labels of Nos. 110 to 200, inclusive, or the change from the words "best six-cord" to "best sewing cotton" or "best sewing spool cotton" upon the boxes is of such a character as that the consumer, using such care as is usual, would be likely to understand that the thread was not in fact six-cord.

(Objected to as hypothetical.)

A. I should think they would not.

515 230 Q. What numbers of complainants' 200-yd. thread which is represented to the public as six-cord is in fact six-cord?

A. All numbers up to and including 100.

231 Q. What numbers of complainants' 200-yd. thread of the same line of goods and marked and advertised and billed as you have just stated is not six-cord?

A. Nos. 110, 120, 130, 140, 150, and 200.

232 Q. What are the six numbers last mentioned?

A. Three-cord.

233 Q. What price, if you know, do complainants receive for these six numbers of 200-yd. thread as compared with the other fifteen or sixteen numbers?

A. The same price.

234 Q. How much less does it cost to manufacture the numbers 8 to 200 of three-cord than it would cost to make the same numbers of six-cord?

A. It costs less than one-half. In the numbers from 8 to 100 the cost of making them six-cord would be just about double. In the finer numbers, from 100 to 200, the cost would be about three times as much to make them six-cord as it would to make them three-cord.

235 Q. State whether the complainants sell thread which is in fact marked and known as three-cord thread of the same quality and size as that which they sell in 200-yd. lengths as six-cord thread.

A. They do.

236 Q. What price do they get for the same amount of thread in each—that is, when they mark it three-cord thread what price do they get? And when they don't mark it three-cord thread, but in the way shown in the exhibits of thread Nos. 110 to 200, inclusive, what price do they get?

A. Twenty-two and a half cents for 2,400 yards when marked three-cord, and about forty-seven and a half cents or forty-eight cents for 2,400 yards when marked as in the exhibits referred to.

237 Q. If I understand you, the 2,400 yards in the first case
516 is put on one spool and in the second case on twelve spools. Am I right?

A. Yes.

238 Q. What is the difference in cost between putting up the 2,400 yards on one spool and the same amount with 200 yards on each of twelve spools?

A. It costs about one cent less to put 2,400 yards on one spool than it would to put 2,400 yards on twelve spools of 200 yards each.

239 Q. So that, if I understand you, the complainants put up three-cord thread of a certain size and quality, and when they mark it three-cord they sell it for about half of the price they receive for the same quantity when they put the same thread upon 200-yard spools as shown in the exhibits. Am I right?

A. Yes.

240 Q. State whether, in your opinion, the greater price received for such 200-yard thread furnishes a motive for dressing up and marking and boxing and advertising and billing the said 200-yard three-cord thread as and for six-cord as shown in the exhibits put in evidence?

(Objected to as incompetent and as leading.)

A. I should think it did.

241 Q. State whether, in your opinion, the six-cord price could be obtained for that 200-yard thread provided it were marked with sufficient distinctness to be observable by the consumer using ordinary care that it was in fact three-cord or that it was not six-cord?

(Objected to as hypothetical.)

A. It could not.

242 Q. James Russell, from the Clark Mile-end Company, and Theodore Ives, from the Willimantic Company, gave some testimony touching this practice of complainants. Will you please state
517 whether these two companies as appears by packages of their thread in evidence in this cause are to some extent chargeable with the same practice.

A. Yes.

243 Q. For what purposes is thread finer than No. 100 used?

A. It is used in the largest quantities for sewing straw. It is also used in making fine collars and cuffs and for sewing fine muslins.

244 Q. Why does the Willimantic Company call it superior sewing-machine thread on their reverse label?

A. I suppose it is to show that it will run well on a sewing machine.

245 Q. State whether or not in your experience you have found that Coats' thread is recognized by its having the number, etc., embossed on the periphery of the spool around the black and gold label. If not, how do you find that it is recognized?

(Objected to as incompetent.)

A. I have always found it to be known by the name, and I have never heard any one speak of the embossed numeral around the ticket unless their attention was called specially to it.

246 Q. Do you know of any manufacturer of thread that advertises the sizes 8 to 200 as six-cord except Coats?

A. I do not.

Examination adjourned to Wednesday, June 2, at 11 a. m.

518 NEW YORK, *June* 2, 1886—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of examination of LYMAN R. HOPKINS:

247 Q. State whether there is any resemblance in color between Merrick's six-cord 200-yard white thread and Coats' other than a necessary resemblance arising from the fact that both are white or an accidental resemblance resulting from the process of bleaching, etc.

A. There is certainly no intentional resemblance. We have done our very best to get the best bleach and the purest white that we possibly could, and we have spent considerable money in making filters to get the water perfectly pure for our bleaching purposes.

(Qnestion objected to as leading.)

248 Q. State what proportion of the 200-yard thread from Nos. 8 to 200, inclusive, that is sold in this country by complainants is of numbers finer than 100. I refer to the thread, which is in fact six-cord, Nos. 8 to 100, inclusive, and that which you have stated so resembles those numbers in its dress, mode of marking, and marketing as to be understood to be six-cord. State upon what grounds you form your opinion upon this matter.

A. I have taken the basis of our own production and sales. I have inquired of jobbers dealing in the article and retailers of spool cotton and users of spool cotton in fine numbers, and I have come to the conclusion that a half of one per cent., taking in all those numbers, from 8 to 200, would be a small estimate, and taking the basis of their production, comparing the number of spindles which they run with ours, that basis would make 200 dozen a day which the Conant Thread Company produce of those numbers in this country.

519 249 Q. You have said that some customers ask for the Merrick six-cord 200-yd. thread under the name of American. Why do they do this?

A. It formerly had the name American Thread Co. on the black and gold label, and when we changed that label to the Merrick Thread Co. we still preserved the name American on the reverse end of the spool, and it is there now.

250 Q. In answer to Q. 224 you say, referring to Coats' manufacture:

"All of the boxes from 8 to 200 have their well-known symbol, to wit, the lion and the eagle, which they advertise all over the country as the trade-mark for the United States for their six-cord thread."

State whether, wherever that trade-mark appears, so far as you have seen, the words "best six-cord" appear upon it, except at the top label of the boxes No. 120 to 200 and some of 110.

A. I never saw any except them which did not have "best six-cord" on them, and they have in place of "best six-cord" "best spool cotton" or "best sewing cotton."

251 Q. State whether, in your opinion, this change from "best six-cord" to "best spool cotton" or "best sewing cotton" would be likely to be observed by a customer exercising ordinary care or to have any particular significance if observed.

(Objected to as hypothetical.)

A. I don't think any one would notice the difference, the letters being the same size and beginning with the same letter. In answer to the other part of a question if a person saw "best sewing cotton" or "best spool cotton" they would think it was six-cord.

252 Q. What is the care that the consumer of spool cotton exercises to determine whether he has received a spool or spools of thread of the make he desires?

520 A. He looks to see if the name he wants is on the end of the spool.

253 Q. What is the care that he exercises to determine whether he has received a spool or spools of the size of thread that he desires?

A. He looks at the numeral or figure on the end of the spool.

254 Q. Assuming that consumers of thread exercising such care as is usual in the ordinary course of trade recognize complainants' 200-yd. six-cord thread, Nos. 8 to 100, as of complainants' manufacture by reason of the alleged trade-mark in suit appearing upon one end of the spools, state whether or not, in your opinion, such consumers would or would not be likely to believe that Nos. 110 to 200 of such thread was also six-cord by reason alone of the resemblance of the spool head and label without regard to the advertisements, box-marking, etc.

(Objected to as calling for conclusions from the witness and as leading and as hypothetical.)

A. I think there is much more resemblance between the Coats' 200-yd. spools in numbers finer than 100 to those coarser than 100 than there is between the Merrick's and Coats' spools.

Question being re-read to the witness, the witness says: "I think they would."

255 Q. If you as a practical manufacturer of spool cotton, acquainted with its details and the course of trade therein, did not know as a matter of fact that Coats' 110 to 200 were three-cord, what would the words "best spool cotton," "best sewing cotton," "best sewing spool cotton" on the spools and boxes of such thread mean to you?

A. I should think it was six-cord thread.

Examination adjourned to June 15th, at 10.30 a. m.

521 NEW YORK, *June* 15, 1886.

Met pursuant to agreement.

Examination adjourned to Oct. 5, 1886, at 11 a. m.

NEW YORK, *Oct.* 5, 1886—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Examination of LYMAN R. HOPKINS continued:

256 Q. In question 106 you speak of having referred to cases. What did you mean there by the word cases?

A. I meant the case of the Coats against Holbrook, the case of Clarks against King, and the case of Coats against the Willington Thread Co., and, I think, there was a case of Clark *v.* Clark.

257 Q. State whether Greene or Daniels or Semples or Ellis ever got any hold upon the market with a six-cord thread to any considerable extent.

(Objected to as calling for a conclusion.)

A. Ellis I never heard of in the making of thread. Greene and Daniels made a three-cord thread for quite a long time. I never saw any of their six-cord thread in my life, and they have now stopped putting up spool cotton altogether as I understand. Semples made but very little six-cord and has now gone out of business.

258 Q. If Ellis or Greene and Daniels had put a six-cord thread upon the market to any considerable extent, would you have been likely to be aware of it?

(Same objection.)

A. I think I should.

522 259 Q. Did your company ever receive any other letter from the Coats people or their attorneys than those you have referred to in this deposition?

A. No.

260 Q. For how many years, to your knowledge, has it been customary in this country to put up six-cord thread for family use on two-hundred-yard spools of the shape and size and with black and gold circular labels and concentric rings and stating name, length,

quality, and size shown in Defendants' Exhibit No. 48, Chronological Exhibit of Thread Manufacturers?

A. From twenty-five to thirty-five years.

261 Q. State whether, as you understand it, the alleged trade-mark of the Coats people, with a lion represented onto it, is used in connection with any of their thread, except their six-cord thread and such three-cord thread as is put up on two-hundred-yard spools and put up and sold as you have testified as and for six-cord and at the six-cord price.

A. I think it is not.

(Objected to as immaterial; also as calling for a mere "understanding.")

262 Q. State whether, in your opinion, ordinary purchasers, giving the ordinary amount of care and attention which such purchasers give in purchasing such articles, would be likely to make the mistake of taking Merrick's six-cord thread for Coats', supposing it to be the Coats.

(Objected to, as the witness is not shown to be qualified.)

A. I think they would not.

263 Q. Look at the box of thread here put in evidence and marked "Defendants' Exhibit No. 50, Box Willimantic 120 Thread, W. H. K., notary," and state whether it represents the way in which that company puts up and boxes its two-hundred-yard thread of numbers higher than one hundred.

(Objected to as immaterial)

A. It does.

523 Cross-examination by F. H. BETTS, Esq.:

264 X Q. Please state again the different thread-making concerns, if any, that you were connected with before you became connected with the Merrick thread business.

A. I never was connected with any thread concern before the Merrick Company.

265 X Q. Were you connected with the Merrick thread business before that business became incorporated, in 1865?

A. No.

266 X Q. Then your first connection with the thread-making business in any way was at the time of the incorporation of the Merrick Thread Company, in 1865?

A. If you mean spool-cotton thread, I say yes.

267 X Q. What connection, if any, did you have with thread business of any kind before 1865?

A. I was a manufacturer of cotton yarns; some of it was double and twisted, sold in balls and in skeins; some of it might have been called thread.

268 X Q. With what concern or concerns were you connected in that kind of business?

A. No concern; I was alone.

269 X Q. Under what name did you do business and where was your factory?

A. I did business under the name of L. R. Hopkins, and for a short time it was Hopkins & Gates, in West Greenwich, Rhode Island, and I run for a time one mill in Coventry, Rhode Island; I was connected at one time with a mill at Burlington, Vermont, that made print cloths.

270 X Q. How long were you connected with this yarn business?

A. I commenced when I was 21 years old, and have been in it ever since in connection with the Merrick Thread Company or alone. I am now 62.

271 X Q. Does the Merrick Thread Company manufacture cotton yarn in addition to spool cotton?

A. In order to make spool cotton the cotton has to be manufactured into yarn first; it's the first operation.

524 272 X Q. Does the Merrick Thread Company manufacture yarns for sale as such or does it only manufacture yarns as a step in the manufacture of spool-cotton thread?

A. We don't sell any single yarn that I know of. We don't manufacture it to sell as yarn.

273 X Q. Has the Merrick Thread Company ever done so?

A. They might have sold some double and twisted yarn in the skein, a very small quantity.

274 X Q. Is the dealing in yarns in balls or skeins a different branch of business from that of dealing in spool-cotton thread?

A. Some deal in both of them, but I should think, as a general thing, they were comparatively separate.

275 X Q. Do the two kinds of business come in competition with each other in any way?

A. I should think not in the family trade on spool cotton.

276 X Q. Do they for manufacturing purposes?

A. They might to a small extent where they use a very coarse thread.

277 X Q. Have you ever known of any such competition?

A. I have known parties who were buying a very coarse spool cotton to change and buy it in the skein, and *vice versa*.

278 X Q. When was that?

A. The cases that I remember were some four or five years ago.

279 X Q. Prior to 1865 did you ever deal in spool-cotton thread?

A. Yes.

280 X Q. In what way?

A. Retail.

281 X Q. Where?

A. West Greenwich, Rhode Island.

282 X Q. Did you have a store or shop there?

A. Yes; a retail store.

283 X Q. What kind of goods did you retail?

525 A. A general country store; calico, boots and shoes, threads, groceries, etc., etc.

284 X Q. Was that your only experience in dealing in spool-cotton thread prior to 1865?

A. Yes.

285 X Q. How large a place was West Greenwich, Rhode Island, at the time?

A. West Greenwich is a town in the State of Rhode Island. The place where my store was was Noosneck.

286 X Q. How large a place was Noosneck?

A. At that time there were four cotton mills there. I suppose there must have been two or three hundred inhabitants.

287 X Q. Do you remember what kind of spool-cotton thread you dealt in in your store at Noosneck; and, if so, what?

A. Yes; I remember dealing in Coats', Clark's, and Orrs & Macnaught's.

288 X Q. What do you suppose your thread sales amounted to annually?

A. I should think from fifty to a hundred dollars.

289 X Q. How long did you keep that store?

A. I should think from about six to eight years.

290 X Q. You have stated that you were an officer of the Merrick Thread Company from the time of its incorporation, in 1865. What office did you hold at first?

A. I was a director.

291 X Q. Have you ever held any other office except that of president; and, if so, when?

A. I think I was appointed auditor a number of years.

292 X Q. Do I understand you to say that you were a director of the company from 1865 till about twelve years ago, 1874, and have been president ever since?

A. I have been a director of the company, and am now, ever since it was founded and have been president about twelve years.

526 293 X Q. I suppose you became connected with the Merrick Thread Company by reason of your previous connection with the business of spinning yarns. Is that so?

A. Well, I couldn't say that was so. I couldn't say that was the cause.

294 X Q. Could you say that was the cause?

A. Mr. Palmer first called my attention to it. I looked into the business and made up my mind that it was a branch of business which could be made profitable to the manufacturer in this country.

295 X Q. Who was Mr. Palmer and when did he first call your attention to the business?

A. Mr. Palmer was dealing in spool cotton at that time, and I think it was in 1864 or 1865.

296 X Q. Give Mr. Palmer's full name and state whether he was at that time connected with the Merrick business, if you know.

A. Herbert F. Palmer, and I think he was connected with Merrick Brothers & Company.

297 X Q. State briefly the magnitude of the business and number and character of the buildings of the Merrick Thread Company and

the number of their employees at the time of their incorporation in business, in 1865.

A. The business of Merrick Bros. & Co. was carried on at Willington, Conn. At the time the Merrick Thread Co. was formed they went to Holyoke, Mass., built a mill two hundred and fifty feet long, eighty feet wide, four stories high, and put in ten thousand spindles. I could not tell how many hands there were at the time. I can give it approximately; I should think about a hundred hands. I don't think the place where the Merrick Bros. & Co. did their business was Willington, after all. I will find out about that.

298 X Q. Do you know under what name the Merrick thread business was carried on at the place they were located before moving to Holyoke?

A. Merrick Bros. & Co. was the name of the concern.

527 299 X Q. In your answer to the 256 Q. you spoke of a case of Coats against the Willington Thread Co. What concern was that?

A. It was the Willington Thread Co. It was a company that made thread at Willington.

300 X Q. Were the Merricks connected with that company?

A. Not that I ever knew of.

301 X Q. Were the Willington Thread Co. located near the Merricks?

A. I couldn't say how far apart they were. They were both in Connecticut, and I do not think they were very far apart.

302 X Q. Do you know what the cause of complaint was by Coats against the Willington Thread Co.?

A. As I understand it, it was because they had used their name—the name Coats.

303 X Q. Do you mean that they had labeled their spools with Coats' name?

A. Yes; I mean that they had used the word "Coats" on their label.

304 X Q. Did you ever hear that the Merricks were connected with that business?

A. No.

305 X Q. Are you sure?

A. I have never heard that the Merricks were connected in the business of the Willington Thread Co. Mr. Merrick turned spools as a laborer with that company, I have heard.

306 X Q. What Mr. Merrick was that?

A. Timothy Merrick.

307 X Q. What was his connection with the Merrick Thread Co.?

A. Treasurer.

308 X Q. What do you mean by turning spools as a laborer?

A. I mean that making spools is a business by itself, and they are made by the workmen by the day or for so much a gross on a turning lathe.

309 X Q. Where was it that he made spools for the Willington Co., as you understand it?

528 A. All I can say is that I have heard him say that he made some spools for that company; that's as far as I can go.

310 X Q. You know nothing whatever more about it?

A. No.

311 X Q. Is he still living and is he the treasurer of the Merrick Co.?

A. He is.

312 X Q. Have you heard him describe this case of the Coats against the Willington Co.?

A. I have heard him speak about it since this case commenced, but never before, as I remember.

313 X Q. What have you heard him say about it?

A. After Mr. Auchincloss give his testimony in this case I asked Mr. Merrick if he knew anything about the Willington case and he said he had heard there was such a case against the Willington Co. by the Coats, but he said that he never had any interest in that concern.

314 X Q. Is that all he said about it?

A. He might have spoken some other words; that's all I remember.

315 X Q. Have you acquired any information in regard to the Willington case from any other source than from Mr. Merrick; and, if so, from what source?

A. We sent and got a copy of the proceedings.

316 X Q. Have you got it here and will you produce it?

A. I haven't got it.

(Defendants' counsel produces the copy of proceedings referred to, hands them to complainants' counsel, and gives him notice that unless complainants' counsel puts them in evidence he will himself do so.

Complainants' counsel states that he conceives it to be more proper that defendants' counsel should put it in evidence.

529 Defendants' counsel says that he thinks that he has already put these papers in evidence; that he will examine to see, and if he has not will put them in, and complainants' counsel may consider them as in evidence.)

317 X Q. What kind of spool-cotton thread were the Merrick Bros. & Co. manufacturing at the time when your attention was first called to their business?

A. Three-cord glazed thread; I mean polished thread, polished with a brush.

318 X Q. By what name was it known?

A. Merrick Bros. & Co.

319 X Q. Any other name?

A. I never heard of any.

320 X Q. Was it called the American thread?

A. No.

321 X Q. Have you any sample of the style of thread and spool dealt in by Merrick Bros. & Co.?

A. I can get one if you wish.

322 X Q. Will you produce such a specimen at the next session?
A. Yes.
323 X Q. Did Merrick Bros. & Co. make more than one kind of thread?
A. That I couldn't say.
324 X Q. You spoke in answer to certain questions on the direct examination of the policy and purpose of the Merrick Thread Company in conducting their business. Please state whether it has been the policy of that company to meet the demands of the market for different kinds of thread as such demands have from time to time arisen.
A. Please read the question again; I don't understand it.

Question being read, the witness says:

We have endeavored to make our thread of the very best quality, and in doing so have found that its sale has constantly increased from the organization of the company. We have made some
530 three-cord and some six-cord, but the six-cord demand has increased faster than the three-cord.

Adjourned for lunch.

(Witness says that he has found out that the name of the place where Merrick Bros. & Co. were located was Mansfield Center. He also calls attention to the fact that the three-cord glazed thread referred to by him in answer to 322 X Q. is represented by samples in "Complainants' Exhibit Comparative Samples," in compartment 12.)

325 X Q. You have not quite answered 324 X Q. Please hear it read again, and endeavor to answer it fully.

Question re-read.

A. The demand has been for a finer and a better thread continuously, and we have endeavored to follow it and make it of that quality.
326 X Q. Has it always been the purpose and the policy of your company to meet any demand for any particular kind or quality of thread as soon as the demand arose?
A. Not always. We have had inquiries for a great many kinds of low-grade thread which we didn't pretend to make or cater to.
327 X Q. Has it been the purpose and policy of your company to meet any demand for the finer kinds and qualities of thread as soon as any such demand arose?
A. We have endeavored to make our thread finer and better to meet the demand of the market, because the market has constantly demanded a finer and better thread. We have followed and grown after it as fast as we could.
328 X Q. Can't you answer the last question a little more specifically? Please hear it read again.

Question re-read.

A. We have endeavored to make what the market demanded as near as we could in the finer numbers.

531 329 X Q. Have you endeavored to keep yourselves informed as to the demand of the market for different kinds, numbers, and qualities of thread?

A. Our selling agents send their orders to the mill every week, and sometimes oftener, of the kinds of thread which they wish us to make for them, and we endeavor to follow their instructions.

330 X Q. Please answer the last question.

Question repeated.

A. We keep ourselves informed in that way; they know the demand better than we do at the mill.

331 X Q. Do they act in the manner you have described under instructions from you?

A. Yes.

332 X Q. And do I understand that as soon as you have understood that there is a demand for any of the finer kinds or qualities of thread you have endeavored to meet that demand by manufacturing the kind called for as promptly as possible?

A. Yes.

333 X Q. So far as you know, have your agents kept you well informed as to the conditions and demand of the market?

A. I suppose they have, as far as I know.

334 X Q. You have increased the number and kinds and number of sizes of thread manufactured by you from time to time, have you not?

A. Yes.

335 X Q. Do I understand you to say that as you found that any particular kinds, qualities, or sizes of thread of the finer sort are demanded you have endeavored promptly to meet such demands?

A. Whenever we have had orders from our agents to make any kinds in our line we have endeavored to make them as soon as we could.

336 X Q. Are you willing to say that your company has kept up to the demands of the market by increasing the variety of its sizes of thread as the same have been called for?

532 A. I don't know that we have kept up to the demand, but we have done the best we could towards it.

337 X Q. Do you think you have been slower than other companies in keeping up to the demands?

A. I don't know that we have; I think they have all done the best they could.

338 X Q. Do you think you have been as prompt as other companies in this matter?

A. Well, sir, I couldn't say, because I don't know about the other companies so well as I do about our own. We have done all we could to keep up to the demand in the fine numbers.

339 X Q. Do you think that you have been successful in doing so?

A. I think that is a help to our success.

340 X Q. You mean to say that you attribute a portion of your success as a company to the promptitude with which you have met the demands of the market for the finer grades, qualities, and sizes of thread?

A. I should think it had been.

341 X Q. I suppose you mean that you do attribute success to such cause?

A. I mean that the Merrick Thread Company is constantly improving and making their goods finer and better as the market demanded; has been a portion of the success of the Merrick Thread Company.

342 X Q. Do you mean by "finer" finer sizes?

A. Yes.

343 X Q. Do you think any company has been ahead of yours in the promptitude with which it has met the demands of the market for finer or better thread?

A. I couldn't say; some of them claim to; whether they have or not I must leave to some one else.

344 X Q. What is your own opinion on the subject from your knowledge of the trade?

533 A. I think we have kept as nearly up to the demand as any of them.

345 X Q. Have you yourself watched the market and its demands so as to know what kinds and qualities of thread have been wanted?

A. Yes.

346 X Q. What kind or kinds of thread did the Merrick Thread Company manufacture in the first year of their business—1865–1866?

A. Three-cord threads, glazed mostly—not all.

347 X Q. About what would their sales during the first year amount to?

A. I couldn't answer that till I looked at the books.

348 X Q. Can't you give any idea?

A. Well, that was during the war, you know. I should think in 1865, the first year after we started, from one hundred and fifty to two hundred thousand dollars.

349 X Q. Did you make any six-cord or four-cord thread at that time?

A. I think we did a little.

350 X Q. What numbers did you make of three-cord thread during the first year?

A. My impression is that we made up to No. 100, but I am not certain.

351 X Q. Not above 100?

A. I couldn't say without looking; I don't remember.

352 X Q. What number did you make of four-cord thread during that year?

A. If we made any it was in the coarser numbers.

353 X Q. What numbers?

A. Numbers from 20 to 40.

354 X Q. What numbers did you make of six-cord thread that year?

A. I couldn't say certainly that we made any, but if we made any it was from 20 to 50, and if either kind—four-cord or six-cord—was made during that time it was put up on a large spool—that is, larger than two hundred yards.

534 355 X Q. What was the style of spool and label used for your three-cord thread, two-hundred-yard length, in 1865?

A. It was the same as those shown in compartment 12 of Complainants' Exhibit Comparative Samples.

356 X Q. And were the same spools and labels used as Merrick Bros. & Co. had used before the organization of the company for the three-cord thread of two hundred yards?

A. Yes; the same ticket; the spool was the same shape.

357 X Q. Have you ever made any change in the spools or tickets or labels for the three-cord thread on two-hundred-yard spools?

A. We put up three-cord thread under different brands; I mean to say that we have more than one brand for three-cord thread—more than one ticket.

358 X Q. But have you continued to use the old style of labels shown in compartment twelve from the time of the organization of the company till the present time?

A. We have on part of our three-cord thread.

359 X Q. Will you produce at the next hearing samples of any other styles of spools or labels used by your company on three-cord thread on two-hundred-yard or longer lengths?

A. Yes.

360 X Q. In what year did the Merrick Thread Company first commence to put up and deal in six-cord thread on two-hundred-yard spools?

A. I think it was the latter part of 1867 or the fore part of 1868.

361 X Q. Have you here specimens of the spools and labels for six-cord thread first used by them?

A. Yes; they are found in Defendants' Exhibit No. 45, Merrick Thread with American Label No. 1, already in evidence.

362 X Q. What numbers of the six-cord thread did you manufacture during the first year of the introduction of the six-cord two-hundred-yard spools?

535 A. I think we went up as high as 90.

363 X Q. Can you state from memory the year or years in which you added any finer or higher numbers to your two hundred yard six-cord thread?

A. I could not.

364 X Q. Can you do so by referring to books?

A. Yes, sir.

365 X Q. Will you prepare yourself to do so at the next session, giving the date of first sale of any such higher number?

A. I will do as much as I can towards it; we don't keep the number of the thread we sell; it's so many dozen six-cord and so many of three-cord; the number is not put in; the six-cord is all

one price, any number, and the same is true of any brand of three-cord.

366 X Q. Have you any means of fixing the date when you introduced any number of six-cord higher than ninety?

A. I think I can find out at the mill something about it.

367 X Q. From books?

A. I think I can find out from our superintendent; we have had the same one all the time and he keeps a record; he will know more than I do of dates and times.

368 X Q. Will you bring at the next session any book or record that will enable you to fix the date inquired about?

A. I will do the best I can.

Examination adjourned to 10.30, October 8th, 1886.

Adjourned by agreement to October 13th, 1886.

536 NEW YORK, *Oct.* 13, 1886.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of cross-examination of LYMAN R. HOPKINS:

(Defendants' counsel here offers in evidence a certified copy of proceedings in the case of Coats *v.* Willington Thread Co., and the same is marked Defendants' Exhibit No. 51, Coats *v.* Willington.)

369 X Q. Have you here with you the books or records called for in 368 X Q.?

A. I have a record of what I consider to be an answer to the question.

370 X Q. Will you let me see it, Mr. Hopkins?

A. Yes.

371 X Q. What is the paper that you have handed me; is it in your handwriting, or, if not, in whose?

A. It is in my own handwriting.

372 X Q. From what source did you get the dates specified on the paper you have handed me?

A. I got them from our superintendent.

373 X Q. Are the dates specified on this paper that you have handed me the earliest dates that you have been able to obtain on which your company was making the several sizes of thread specified in said memorandum?

A. Yes; I went to Mr. Dunham, our superintendent, and asked him if he kept any memorandum of the time when we commenced to make the different numbers of six-cord thread, and he said he thought he could tell something about it. He got his memorandum books and examined them and said that was as near as he could get to it.

374 X Q. Then do I understand from your evidence that the nearest approximation that you can make in regard to the times when the Merrick Thread Company commenced to make
537 their different sizes of six-cord thread are the dates specified in the memorandum you have handed me?

A. Yes.

375 X Q. Do I correctly understand from said memorandum that the time of commencing to make the numbers six-cord thread up to and including No. 50 was about January first, 1869; that the time of advancing the numbers so as to make Nos. 60 and 70 of six-cord thread was about January 1st, 1870; that the time of commencing to make No. 80 six-cord thread was about January 1st, 1874; and that the time of commencing to make Nos. 90 and 100 six-cord thread was about June 27th, 1874; and that the time of commencing to make numbers above 100 six-cord thread and up to and including No. 140 was about January 1st, 1885? Is that correct?

A. If you mean that is the time we commenced to make six-cord it is not exactly correct. We had been making up to No. 50 six-cord some little time previous to January 1st, 1869. It takes considerable time after you commence to make six-cord thread in fine numbers before you can get it polished, and what I mean to say is that we made these changes from 50 up in finer numbers between these dates in this memorandum. That's what I mean. My memorandum handed you reads as follows:

"I find that on Jan. 1, 1869, we were making six-cord up to and including 50, and on Jan. 1, 1870, we had advanced to No. 60 and 70, and on Jan. 1, 1874, we had made No. 80 six-cord, and on June 27, 1874, we were making 90 and 100 six-cord, and on Jan. 1, 1885, we were making up to and including No. 140 six-cord."

376 X Q. What were the records from which the memorandums you have read were taken?

A. They were memorandum books which our superintendent keeps of the twisting department.

538 377 X Q. Did those books show the kind of work done and the sizes of thread twisted in the twisting department?

A. He keeps a memorandum of the way in which he makes these different numbers, and he has the dates in those books at different times.

378 X Q. Will you produce those memorandum books?

A. He will do it probably; he will come here with them.

379 X Q. What do you understand that the dates you have produced on your memorandum are? Are they the first dates found of finishing the different sizes of thread specified?

A. I asked Mr. Dunham to give me as near as he could from his memorandum book the dates that we made the changes from No. 50 finer in our manufacture of spool cotton. I mean of all the finer numbers.

380 X Q. And those are the dates which are specified in the memorandum which you have read?

A. Yes; those are the dates that he gave me that we were making those numbers, twisting them, finished them in the skein.

381 X Q. And do you understand those dates are respectively the earliest dates he could find of the making of those numbers respectively?

A. I think they are.

382 X Q. Has your company ever made six-cord thread of a size finer than No. 140?

A. Not that I know of.

383 X Q. Has it made three-cord thread of a size finer than No. 140?

A. Yes.

384 X Q. Up to what number?

A. We have made No. 160 quite largely. I think that is the finest.

385 X Q. In your answer to 359 X Q. you promised to produce at the hearing samples of any other styles of spools or labels than the Merrick Bros. & Co. label which have been used by your
539 company on three-cord thread on two-hundred-yard or longer length spools. Have you done so?

A. Yes.

(Witness produces two spools, which are marked for identification respectively "Crowley" and "Carlisle" thread.

Complainants' counsel offers the two spools in evidence, and they are marked "Complainants' Exhibit Defendants' Carlisle Spool" and "Complainants' Exhibit Defendants' Crowley Spool.")

386 X Q. How long has your company been making and selling thread on spools and with labels like those shown on "Complainants' Exhibit Defendants' Carlisle Spool"?

A. About fourteen years ago our company bought out a company called the Carlisle Thread Company, who were doing business at Rockville, Conn.; we bought their stock on hand and the right to use the name, and have put up some three-cord thread under that brand ever since.

387 X Q. In what numbers?

A. I can't say certainly, but I think all numbers up to about seventy or eighty.

388 X Q. And how long has your company been making and selling thread on spools and with labels like those shown on "Complainants' Exhibit Defendants' Crowley Spool"?

A. That is a name which we adopted for what we call our "seconds;" the thread is inspected and all the spools which we find imperfect are taken out, the same as all other thread-manufacturing companies that I know of do; and that name has been used for that purpose ever since the company made spool cotton.

389 X Q. Who was the unfortunate Crowley under whose name all the imperfect spools have been sold?

A. Well, I have made that inquiry myself to find out why that name was taken, and they told me there was a man by that name that worked in the mill; that's all there is that I can say.
540 390 X Q. Have you ever known such a man since you have been connected with the company?

A. I couldn't say that individually I have; we have a thousand names, and I don't know individually but a few of them, comparatively.

391 X Q. Has there been any such concern as the Carlisle Company for the last fourteen years?

A. I don't exactly understand what you mean. I think the company we bought out have never done any business since, that I know of.

392 X Q. Do you make the thread that you label "Carlisle Company's thread" yourselves in your manufactory?

A. We wind it all.

393 X Q. Where is it made?

A. Some of it we spin and twist and some of it we buy in the skein; the larger portion we do the whole, the spinning and twisting and all.

394 X Q. How is it different, if at all, from the thread you label as "Merrick Brothers & Co."?

A. It is made of a different kind of stock or cotton.

395 X Q. Can you state approximately when your company commenced to make the high numbers of three-cord thread above No. 100?

A. No; I couldn't do it. I could answer that in a general way, but I could not answer when we advanced from No. 100; probably within three or four years. We have made as high as No. 150 three-cord for the last six years, I should put it.

396 X Q. Then, as early as six years ago, you think you made the higher numbers of three-cord thread, between 100 and 150?

A. I should think we did.

397 X Q. And it was probably earlier than that that you made some of those numbers?

A. I should think we did, some of them; some of those numbers earlier than six years ago.

398 X Q. Will you ascertain and state at the next hearing the earliest dates when you commenced to make the different numbers of three-cord thread of numbers higher than 100?

541 A. I will try to.

399 X Q. In your answer to 360 X Q. and 361 you stated that the first six-cord thread which your company put up and dealt in was that found in Defendants' Exhibit No. 45, bearing what you call "American label No. 1." Please state how long your company continued to use the style of label called American label No. 1 for all their six-cord thread.

A. Two hundred yards. We used it for ten years.

400 X Q. Do I understand you to mean that all of your six-cord two-hundred-yard spools bore the label which you have called American label No. 1 down to 1878?

A. All except what we threw out and put the Crowley label on as "seconds."

401 X Q. And did all the said spools of two-hundred-yard six-cord thread up to that time bear the label on the reverse end of which reads as follows: "The standard thread, sea island, two hundred yards," as shown on the specimen spools, Defendants' Exhibit No. 45?

A. I couldn't say that they all did. There might have been some change in the label on some of them. It was a good while ago.

402 X Q. So far as you know, did they always bear that label on the reverse end?

A. My impression is that there was a change once during those ten years, where they had American on the other end.

403 X Q. But you don't know what that change, if any, was?

A. I can't say. I know there was a change in the color, and I think there was in the wording.

404 X Q. Please read the lettering on the label which you call the "American label No. 1" and which you say was used on all your two-hundred-yard six-cord thread down to 1878 except on the Crowley brand?

A. "American Thread Company machine twist." The No. 50 appears on the particular spool I am reading.

542 405 X Q. During that period, from 1868 to 1878, was there any such concern in existence as the American Thread Company?

A. No such company that I know of.

406 X Q. Had you known of any other concern whose thread had, prior to the organization of your Merrick Thread Company, been known and labeled as "American" thread?

A. I might have seen spools with the word "American" on them. I don't recall any to mind just now. I might have seen them.

407 X Q. Is it not a fact that the Willington Thread Company, the neighbors of the Merrick Brothers, had, for a long time prior to the commencement of the use by your company of what you have called the "American" label, labeled their thread with the word "American"?

A. I couldn't say. I never saw a spool of their thread.

408 X Q. Please look at the exhibit which has been offered in evidence to-day on your behalf and which consists of the injunction obtained by the Messrs. Coats against the Willington Thread Company as early as 1854, and state if it does not appear therefrom that upon the Willington Company's label the word "American" was used.

A. I find in this paper that the complainants aver that the word American was used on the end of the spools in small letters.

409 X Q. Have you any memorandum here which will enable you to state approximately when the Merrick Thread Company commenced to use each of the different kinds of labels which it has in fact used for its six-cord thread?

A. I can tell you. I have no memorandum, but I know.

410 X Q. Please state such several dates.

A. The first label on two-hundred-yard spool cotton, six-cord, the latter part of 1868. This label appears in Defendants' Exhibit No. 45, Merrick Thread with American Label No. 1. The label

543 which appears on Defendants' Exhibit No. 46 was the next label and was adopted in 1869 and used on lengths longer than two hundred yards. The next label appears upon the line of

spools shown in Defendants' Exhibit No. 48, having our name of Merrick Thread Company on it. That began to be used in the latter part of 1878 or the first part of 1879.

Adjourned for lunch.

411 X Q. Have you here any specimens of spools and labels used by your company for their two-hundred-yard three-cord thread in numbers finer than No. 100 prior to January 1st, 1885; and, if so, will you produce them?

A. I produced what you wish for as Defendants' Exhibit No. 19 on direct examination.

412 X Q. Did all the numbers of three-cord thread finer than No. 100 have the black and gold label which appears on the specimens of spools which you have produced?

A. All the two hundred yards did.

413 X Q. All the other numbers of your three-cord thread on spools of two hundred yards had red and blue labels with the name of Merrick Bros. & Co. on them, did they not?

A. No; we made other three-cord thread that didn't have the red and blue label on it; a large majority of that thread, however, did have a red and blue label, which appears in Complainants' Exhibit "Comparative Samples," Compartment No. 12.

414 X Q. And the rest of it had the Carlisle Company label, did it not?

A. Well, Carlisle and Crowley; Crowley is used both for the three and six cord; one says Crowley six-cord and the other says Crowley finished, as shown on Complainants' Exhibit Defendants' Crowley Spool.

415 X Q. Now, is it not a fact that your company's labels on all of the fine numbers of their two-hundred-yard three-cord thread
544 above 100 much more nearly resemble the label used by them on six-cord spools than they did those used on three-cord spools below 100?

A. I should think they did.

416 X Q. Is it not a fact, also, that your company was in the habit of selling its two-hundred-yard three-cord thread of fine numbers above 100 at the same price at which they sold six-cord thread on sizes up to 100?

A. Well, sir, I will answer that question in this way, just as it is: There might have been some of those numbers sold before my attention was called to it at the same price as the other; but as soon as my attention was called to it I ordered them to sell it at the three-cord price; and quite soon after that we commenced to make six-cord in those higher numbers than 100 and mark them six-cord.

417 X Q. Before the time when you say your attention was called to the matter it is a fact, isn't it, that your company always sold its high numbers of three-cord thread on two-hundred-yard spools at the price of six-cord thread?

A. I inquired, when my attention was called to the fact that they were putting the black and gilt label on three-cord thread finer than

100, how much they had put up in that way; they said but a very little—not over two hundred dozen—and that thread, some of it, probably, was sold for the same price as six-cord.

(Latter part of answer objected to as hearsay.)

418 X Q. All that was so sold before your attention was called to the matter that had a black and gold label was sold at the price of six-cord thread, was it not?

A. I suppose it was.

419 X Q. And all the three-cord thread that your company had made before the time when you say that your attention was called to it and put up on spools of 200 yards in numbers finer that 100 had that black and gold label, had they not?

545 A. They had, as shown on Defendants' Exhibit No. 19.

420 X Q. Please state the time when you say your attention was called to the fact that your company had been using a black and gold label on its fine numbers of three-cord thread which more nearly resembled the six-cord label than the three-cord label and when your attention was also called to the fact that your company had been selling these fine numbers of three-cord thread at a six-cord price.

A. I should think that was about five years ago. Mr. Morrison, superintendent of the factory, said it was six years when my attention was called to the putting of the black and gold label on the three-cord thread. I asked Mr. Palmer if he was selling any numbers finer than 100 of 200-yard thread, and he said he had ordered a few dozen. I asked him if it had the six-cord ticket on it, and he said it did not. I asked him if he sold it at the same price he did the six-cord, and he said that he should put in those few dozen at the same price or something to that effect; and I told him it was three-cord at that time and to sell it at three-cord price; that's as near as I can get at it. Mr. Palmer is our New York agent.

421 X Q. In your answer to the 416 question I understood you to say that you ordered the fine numbers of three-cord thread to be sold at a three-cord price shortly before your company commenced to make six-cord thread in those numbers finer than 100; is that correct?

A. Read the 416th question and I will answer.

Question being re-read.

Well, I couldn't say "shortly;" it was before. "Shortly" is a very indefinite term.

422 X Q. You did say it was "quite soon" after this change in price that you commenced to make the six-cord thread in the high numbers above 100, did you not?

546 A. I think those are the words he asked me, and I think I said "quite soon" or "yes."

423 X Q. And was that true?

A. Yes.

424 X Q. Now, about how long was it that you ordered the change

in price referred to before commencing to make the high numbers above 100 in six-cord?

A. I should think it was about a year and a half.

425 X Q. Was that what you meant when you said "quite soon"?

A. Yes.

426 X Q. I understand you to say that you commenced to make the high numbers above 100 in six-cord about January 1, 1885; is that correct?

A. We were making in 1885 six-cord up to 140; we had made some six-cord finer than 100 before that time; I could not say exactly how long.

427 X Q. Isn't it a fact and haven't you repeatedly stated to-day that January 1, 1885, is the earliest date at which you can fix the making of a six-cord thread in numbers finer than 100?

A. I have said that we were finishing those numbers and making six-cord 200-yards up to 140 January 1, 1885, but we commenced to make them six-cord finer than 100 before that date.

428 X Q. What do you mean by "commenced"?

A. I mean that we have to commence to spin and twist the yarn before we can finish the thread; in those fine numbers it's a very slow process and takes considerable time.

429 X Q. About how much time before the thread is finished?

A. I should think it would take three months before we could get a batch through.

430 X Q. And do I understand you to say that you think it might have been a year and a half before that commencement of the manufacture of high numbers of six-cord thread above 100 that you gave the order to change the price of the high-number three-cord spools to the price of three-cord spools?

547 A. Probably; it was somewhere about that time.

431 X Q. But your company had been making the high number three-cord spools above 100 for a number of years prior to this change of price, had they not?

A. I asked them how many had been made and put up in that way and they told me not over 200 dozen.

(Answer objected to as hearsay.)

432 X Q. Question repeated.

A. I couldn't say how long prior.

433 X Q. Haven't you already owned up to five or six years of that manufacture?

A. On 200-yards spools?

434 X Q. Yes.

A. No; I have not unless I have mixed up the 200 yards with the long lengths.

435 X Q. About how long had you been making the 200-yards finer numbers of three-cord thread above 100?

A. About how long to when?

436 X Q. To the time you changed the price.

A. I can't say exactly how long it had been since they had put

up finer than 100 two hundred yards at the time that I ordered it sold at the three-cord price.

437 X Q. Will you ascertain?

A. I will try to.

438 X Q. Will your books show when you commenced to put up 200-yard spools of three-cord thread in numbers higher than 100?

A. I think I can find out at the mill about when we commenced, and will do so.

439 X Q. How?

A. I think our superintendent will have a memorandum which will show.

440 X Q. Will you produce that memorandum?

A. I will try, if he has it.

441 X Q. Will your books show the date when you changed
548 the price of the high-numbered 200-yards three-cord thread from the six-cord spool price to the three-cord spool price?

A. No, sir; our books won't show it.

442 X Q. The date, then, is a mere matter of guess-work on your part?

A. It is as near as I can remember.

443 X Q. What makes you fix the time you have fixed rather than any other time?

A. I know it was quite a long time before I went to Europe; that is one way in which I fix it.

444 X Q. What connection is there in your mind between that event and your going to Europe?

A. I went over there to get posted up on making spool cotton the best I could.

445 X Q. Question repeated.

A. No other except that; that was a part of my business over there, and I recollect that this was quite a time before I went over there.

446 X Q. Is there any other way in which you can approximate to the time of the change in price in question?

A. No; I can't think of any other except my general recollection.

447 X Q. How did the matter happen to come up at all?

A. I was examining the thread in the packing-room and I saw some of the boxes; that is the way my attention was first called to it.

448 X Q. Had anything been said on the subject by anybody?

A. To me, you mean?

449 X Q. Yes.

A. There might have been; I couldn't say; I don't recollect.

450 X Q. Can't you remember anything about the particular occasion?

A. I remember seeing it in the packing-room and asking Mr. Morrison how much had been put up in that way; I remember that.

451 X Q. Can't you remember anything else about the occasion?

549 A. I remember that he told me that there hadn't been but a very few.

452 X Q. Who was present besides Mr. Morrison?

A. No one, as I remember.

453 X Q. When did this conversation occur?

A. Well, I have told you as near as I can remember. I should think about five years ago.

454 X Q. Where did it occur?

A. In the packing-room in the mill at Holyoke.

455 X Q. What was said on that occasion between you and Mr. Morrison in regard to the black and gold label on that three-cord thread?

A. I don't recollect that we said anything about it. We might have said something, but I don't recollect anything.

456 X Q. Tell us everything that you do remember that was said on that occasion.

A. I recollect seeing the thread in the packing-room there and asking Mr. Morrison about it, and I recollect asking him how much he had put up in that way, and he said not but very little; that's all I can recollect of the talk. I may have talked some more, but I don't remember the words. That was the substance, the essence of it.

457 X Q. What do you mean by "put up in that way"? Do you mean on 200-yard spools, with black and gold labels like that shown on Defendants' Exhibit No. 19?

A. Yes.

458 X Q. Is that the conversation which you spoke of in answer to 420 X Q., in which you said that Mr. Morrison said that it was six years ago?

A. No; I think not; I think that was about a different subject. If you will read that question and answer I will answer this question.

459 X Q. 420 X Q. and answer read to the witness.

A. That was a different time when he said it was about six years.

460 X Q. What was the occasion that Mr. Morrison says happened six years ago and which you referred to in the commencement of your 420th answer?

550 A. If you'll ask me when that conversation took place I'll tell you very nearly, if that is what you mean by your question.

461 X Q. When did the conversation take place that Mr. Morrison referred to when Mr. Morrison said "It was six years when my attention was called to the putting of the black and gold label on the three-cord thread"?

A. Some three or four months ago. I was talking with Mr. Morrison about these fine numbers of six-cord thread and I asked him how long ago it was when I saw that he was putting up thread with spools, labels, and boxes like Defendants' Exhibit No. 19, and he said about six years.

462 X Q. Do you think that was true?

A. Well, I couldn't say. I said I thought it was about five, and he said he thought it was about six.

463 X Q. And was the thread that you and he were referring to three-cord thread of finer numbers than 100?

A. Yes.

464 X Q. And on 200-yard spools?

A. Yes; it was just like Defendants' Exhibit No. 19—that is, in that style and kind of thread.

465 X Q. Then your company was putting up three-cord thread of finer numbers than 100 on 200-yard spools with black and gold labels at least five or six years ago, was it not?

A. Yes.

466 X Q. Did they continue to put up that thread on those 200-yard spools with the same black and gold label up to the time when they commenced to make the six-cord thread of finer numbers than 100?

A. I don't think there was any more twisted for that purpose; they might have put up what they had twisted at that time.

467 X Q. At what time?

A. At the time I had the conversation with Mr. Morrison five or six years ago.

551 468 X Q. Do you mean to say that your company didn't make any three-cord thread finer than 100 on 200-yard spools after the date of the conversation with Mr. Morrison, which occurred, as you say, five or six years ago?

A. I don't think we twisted any for that purpose; I don't think, altogther, there were over 200 dozen of that kind of thread put up by the Merrick Thread Company.

469 X Q. They sold what they did put up, I suppose?

A. No; I don't think it has all been sold yet; but there isn't very much left.

470 X Q. Wasn't there any demand for it in the market?

A. We didn't sell but very little of it.

471 X Q. Question repeated.

A. There was very little demand for a three-cord thread, 200 yards, finer than 100.

472 X Q. Did you give any direction to Mr. Morrison to stop putting it up on 200-yard spools?

A. Mr. Morrison wasn't a man that wound it on 200-yard spools; I gave directions to Mr. Morrison to mark it three-cord on the outside of the wrapper if he put up any more that was then made, or in the works before it had come to his department.

473 X Q. Question repeated.

A. No; I didn't give him any direction, because he isn't the one that puts it on the spools.

474 X Q. Did you give any such instructions to any one else at that time?

A. I think I told Origen Merrick not to make any more for 200 yards finer than 100.

475 X Q. Why did you tell him not to?

A. Because I thought before very long we should be making it six-cord.

476 X Q. Was that the only reason?

A. That's all the reason I can think of.

477 X Q. Why did you tell Mr. Morrison to mark it three-cord on the wrapper?

A. So as to keep it distinct from the other numbers which were marked six-cord on the wrapper.

552 478 X Q. Did it occur to you at the time that the spools as labeled were calculated to convey the impression that it was six-cord thread?

A. Well, I thought that some people might think it was six-cord.

479 X Q. Was any of it ever put up with a wrapper stating it was three-cord?

A. What I mean by the wrapper that I wanted him to put three-cord on was on a ten-dozen package; all our six-cord 200-yard thread is put up in ten-dozen packages.

480 X Q. Question repeated.

A. Yes; the wrapper that is on ten-dozen packages.

481 X Q. Can you produce any of those packages?

A. I don't think I can; that was five years ago, or about that; I will try.

482 X Q. The statements on ten-dozen packages wouldn't help a retail customer very much, would they?

A. No, sir.

483 X Q. And I suppose that people in the trade knew that all the fine numbers were three-cord, did they not?

A. Well, I couldn't tell you about that.

484 X Q. Don't you think it has been understood in the trade always that such was the case?

A. No.

485 X Q. As a matter of fact, it was about four of five years before you commenced to make any of the six-cord in finer numbers than 100, was it not?

A. From when?

486 X Q. From the time of the conversation with Mr. Morrison, that occurred five or six years ago?

A. No; I don't think it was four or five.

487 X Q. It was certainly three or four, was it not?

A. Well, I should say about a year and a half or two years, as near as I can remember.

488 X Q. Do you think that the interval between a period five or six years ago and a period about three months before January 1, 1885, is only about a year and a half or two years?

553 A. Well, it might be a little more; three years will fetch it up.

489 X Q. It was a little more, wasn't it?

A. It is more than two years from five years ago to January 1st, 1885.

490 X Q. It is more than three years, isn't it?

A. Yes.

491 X Q. And it was, in fact, more than three years, wasn't it, from the time of the conversation referred to before you commenced to make the high numbers above 100 of six-cord thread?

A. It was more than three years before we made up to No. 140.

492 X Q. And it was more than three years before you have any record of making any number above 100, wasn't it?

A. I don't think we have any record until we had made up to that number; but that was the last number made.

493 X Q. Question repeated.

A. I think it was about three years; it may be a little more.

494 X Q. And if the conversation with Mr. Morrison occurred six years ago, as he says, more than four years intervened before you made the high numbers above 100 of six cord. Is not that so?

A. It would be more than that before we had a record of it.

495 X Q. And in the meantime you sold what you could of the three-cord put up as shown in Defendants' Exhibit No. 19. Is not that so?

A. Yes; I suppose we did.

Adjourned to October 14, 1886, at 11 a.m.

554 NEW YORK, *Oct.* 14, 1886—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of cross-examination of LYMAN R. HOPKINS:

496 X Q. Are you able to give the dates and produce the memorandum called for yesterday?

A. I can't give the memorandum called for. I haven't had time to go to the mill.

497 X Q. Are you able to give the dates without the memorandum?

A. I can give it approximately.

498 X Q. You may approximate now, as nearly as you can, for each of the numbers of three-cord thread finer than No. 100 put up on 200-yard spools, and you may produce the memorandum later.

A. I should say about 1878 we commenced to put up thread on 200-yard spools made of three cords, and, I think, when we commenced we made them up as high as No. 120 and, perhaps, finer. I couldn't say certain.

499 X Q. About how soon afterwards did you make any higher numbers than 120, three-cord, on 200-yard spools?

A. I couldn't say; we might have made them higher at that time.

500 X Q. Were they put up with a black and gold label such as shown on Defendants' Exhibit No. 19 from the beginning?

A. Yes.

501 X Q. Isn't it a fact that when you commenced to use the

spools and labels complained of in the suit upon your 200-yard spools, Nos. 8 to 100, that it was at that time that you also commenced to put up three-cord thread on 200-yard spools with the black and gold label as shown in Defendants' Exhibit No. 19?

555 A. I think it was somewhere about that time.

502 X Q. Was it about the same time that you discontinued putting up 200-yard six-cord thread with the American Company label shown on the spools in Defendants' Exhibit No. 45?

A. It was about the same time that we made the change in those labels.

503 X Q. When was it, if ever, that you gave up the use of the American Thread Company label on long-length spools which is shown in Defendants' Exhibit No. 46?

(Objected to as immaterial.)

A. We put up several kinds of long lengths, some two ounces, some 2,400 yards, and some 1,200 yards. I think the change in the 2,400 yards and the 1,200 yards was made just about the same time as the label was changed on the 200 yards, and I think that the American label was put on some two-ounce thread awhile longer.

504 X Q. How much longer?

A. I couldn't say.

505 X Q. State as near as you can.

A. It may be put onto a very little of it now; I wouldn't say certainly.

506 X Q. How long after the change of label on the 200-yard spools to the kind of spool and label complained of in this suit can you say for certain that the American Thread Company label was put on any of even the two-ounce long-length spools?

A. I couldn't say for certain just how long. I have said there may be a little up to this day, but I don't know as there is.

507 X Q. How did you alter your spool heads or labels or either of them for the long-length spools at the time that you gave up the use of the American Thread Company label for most, if not all, of such thread?

A. We altered the label from the "American Thread Company" to the "Merrick Thread Company" on the 1,200 and 2,400
556 yards, and we about that time commenced to put up 500 yards six-cord without any label. There was no change made in the spool otherwise that I know of. The name Merrick Thread Company was stamped in the 500 yards on the wood. There was no label on it. The number of the thread was embossed on the spool head.

508 X Q. Then it was at the same time that you gave up the American Thread Company label on most of your long-length spools, to wit, about 1878, that you commenced to put up any of the long lengths on spools without a label, but with the name of the company stamped and the numerals embossed on the heads. Is that so?

A. Not exactly in that way, if I understand it. We had put up

long-length spools without any ticket, with the name stamped and the number stamped on the wood, for a long time before that.

509 X Q. But it was in 1878, was it not, that you commenced to use long-length spools without labels and with the name stamped and numerals embossed around the spool head?

A. We commenced to put up 500-yards six-cord thread about that time with the name stamped on the wood and the numbers embossed on the end of the spool.

510 X Q. Please look at the spool of yellow thread, 2,400 yards, contained in Defendants' Exhibit No. 48, and state if that is a sample of the style of spool head, with the name and numeral stamped, which you referred to in your answer to the 508 X Q. as having been put up before 1878.

A. This is one way that we did it. We had several ways of stamping. Some of it was done by a hand stamp. This was done in a machine made for that purpose. This is the three-cord thread.

(Complainants' counsel offers the spool in evidence, and it is marked "Complainants' Exhibit Merrick Stamped Spool before 1878.")

557 511 X Q. Will you please point out among the exhibits that have been produced any and all other forms of stamped spool head used by your company for any kind of thread prior to 1878? You may refer not only to your own exhibits, but also to the box of samples marked "Exhibit Comparative Samples" by complainant.

A. I refer to the spool marked "Defendants' Exhibit No. 28, Merrick's Early Spool with Stamped Number," as one kind.

512 X Q. Can you point out any other stamped spool heads among the exhibits that were used prior to 1878 of your manufacture?

A. No.

513 X Q. I understand from your answer to 507 X Q. and 509 X Q. that you recognize the difference between "stamping" and "embossing." Is it true that you understand the difference?

A. I understand that an embossed figure means a raised figure, and a stamped figure may be either raised or sunk, but in the sense I used it I meant sunk in the wood.

514 X Q. You think, then, that the word "stamped" is a looser and more general word than the word "embossed." Is that so?

A. I don't understand your meaning. Ask your question a little differently so that I can understand it.

515 X Q. Is it your idea that the word "stamped" is a less specific word than the word "embossed;" that the word "embossed" only means one thing, to wit, the production of raised patterns, while the word "stamped" may apply to several forms?

A. I think they are used *vice versa*—that is, a great many people say "stamped" when the thing is raised, and some say "embossed." "Embossed," I should think, meant a raised pattern more particularly than the word "stamped."

516 X Q. Now, tell me which of the styles of long-length spool

heads without labels was first used by your company in or
558 subsequent to 1878. You may refer to the boxes of exhibits put in by both parties. I notice that in the boxes of exhibits there seem to be three kinds of such spool heads—one with stamped name and hand, stamped figures, and no embossing; one with stamped name, embossed figures, and no embossed pattern between the figures, and one with stamped name, embossed figures, and with embossing between the figures. Please state, if you can, the order in which those several patterns were adopted by your company for their long-length spools without labels.

A. I couldn't do it; not now.

517 X Q. Do you think that your company have any record by which the time of the adoption of each of those styles can be ascertained?

A. I think that I can ascertain the time that those with the embossed numeral and the embossed pattern was adopted.

518 X Q. Will you do so?

A. Yes; I think the one with the embossed numeral but no embossed pattern is a little later than those with the embossed pattern.

519 X Q. Will you ascertain the dates of each kind, if you can?

A. I will if I can.

Adjourned for lunch.

Witness says: I don't know how I can ascertain the dates exactly without going to the mills at Holyoke. I might there be able to ascertain by finding out when the gnarls or dies for making the impressions were made or bought.

520 X Q. From whom did you buy the gnarls or dies for making the impressions for the embossed numbers and patterns on the spool heads in question?

A. We had them made, I think, in Springfield. I couldn't tell the man's name.

521 X Q. Will you ascertain?

A. I will have to go to the mill at Holyoke to do that. I'll endeavor to ascertain. I might find out by writing.

559 522 X Q. How soon after commencing to use the spool heads with embossed numerals and without labels for the 500-yard lengths of spools did you adopt similar embossed spool heads for the 1,200 and the 2,400 yard spools?

A. I don't think we ever embossed any 1,200-yard spools of six-cord thread. We always put a ticket on them.

523 X Q. Will you produce a sample of the 1,200 and 2,400 yard spool bearing the ticket referred to?

A. Yes; I will do so, but I haven't one here.

524 X Q. I notice that the reverse label on the spools bearing the American Thread Company label, contained in Defendants' Exhibit No. 45, bears the words, among others, "the Standard thread." What does the words "Standard" mean in that connection?

A. We meant for it to mean it was a good thread.

525 X Q. Nothing more definite than that?

A. No.

526 X Q. Did you mean to represent by the use of that word that it was the best kind of thread of its size that was made?

A. We meant to represent that it was a good thread of that kind—that is, six-cord thread.

527 X Q. Didn't you mean to represent by the use of that word that it was as good a thread as anybody made of that kind?

A. We meant to represent it was a good six-cord thread. I don't know that we meant to represent that it was the best ever made. We calculated to make as good thread as anybody, and think we do and think we did.

528 X Q. Did you mean to represent by the use of the word "Standard" that the thread upon the spool was as good thread as you could make of the number which the spool bore?

A. You mean the thread on that spool?

529 X Q. I mean the thread on that spool and spools like it.

Question 528 X Q repeated.

560 A. We used at that time Sea island cotton and made our six-cord thread from it, and, so far as I know, it was made as good as we could make it at that time.

530 X Q. And is that what you meant to represent by labeling it "the Standard thread"?

A. We meant to represent, as I have told you before, that it was a good six-cord thread.

531 X Q. And as good as you could make?

A. I have answered that same question once before.

532 X Q. Please answer it again.

Question 531 X Q. repeated.

A. I say we used the Sea island cotton at that time, and the thread under that brand was manufactured as well as we could do it at that time, and that's what we mean to represent by the Standard thread.

533 X Q. You say that the label "the Standard thread" was meant by you to represent that the "Standard thread" was a good six-cord thread. Please say whether either of the labels on the ends of the spool mentions the fact that the thread is six-cord thread, except as that fact is intended to be represented by the word "Standard."

A. No, sir; it is not on the end of the spool, but on the box cover.

534 X Q. Does the label on the spools, The American Thread Company, contained in Defendants' Exhibit No. 46, Merrick Thread with American Label No. 2, state upon either end of the spool that the thread on the spool is six-cord?

A. Yes; it says "best six-cord" on the black and gold label.

535 X Q. Do those spools with the American label No. 2 have upon either end or any part of either label the word "Standard"?

A. No; I think they do not. I am sure these don't.

536 X Q. How was it that your spools of six-cord thread
561 with what you have called "American label No. 1," con-

tained in box No. 45, bore the word "Standard" on the label, but not the words "six-cord," whereas the spools bearing the so-called American label No. 2 in Exhibit No. 46 bore the words "six-cord," but not the word "Standard"?

A. I couldn't answer that question. At the time those labels were got up Mr. Johnson was then alive and was president of the company and he attended to that business at that time.

537 X Q. Now, won't you look at the spools in Defendants' Exhibit Box No. 19 and state whether the label on those spools does not represent that the thread upon them is Standard thread?

A. It says, "American Standard machine thread."

538 X Q. That thread is of higher numbers than 100, is it not?

A. Yes.

539 X Q. And it was all in fact three-cord thread, was it not, and not six-cord?

A. That is three-cord.

540 X Q. And neither the label nor the box tells of how many cords the thread is made except as the number may be implied from the use of the word "Standard;" is not that so?

A. Yes.

541 X Q. And is it as true of the label on those spools as you say it was of the labels on the spools in Defendants' Exhibit No. 45 that by the use of the word "Standard" you meant to represent that the thread was a good "six-cord thread," and that the thread "was manufactured as well as we could do it at that time"?

A. Those labels differ. One said, "The Standard thread;" the other says, "American Standard machine thread." I think that that ticket on this Exhibit No. 19 is a very much later ticket, and I think they used it to show it was a good thread.

542 X Q. Is that the best answer you can give to the last question?

562 A. Yes, sir; I think it is; it is a fair answer.

543 X Q. Don't you think you could answer the 541 X Q. a little more specifically if you tried? Please hear it read again.

Question re-read.

A. I think that we meant the word "Standard" to imply that they were both good threads of their kinds; one was six-cord and the other was three-cord. The first, contained in box Defendants' Exhibit No. 45, we meant to convey the idea was six-cord, because it had six-cord on the cover of the box containing the thread; we thought that was sufficient; I suppose that was Mr. Johnson's idea; he got up those labels and marks.

544 X Q. And did the use of the word "Standard" on the three-cord thread indicate that it was as good a thread of the size as you could make?

A. It would indicate it was as good as we could make three-cord.

545 X Q. You didn't say anywhere on the spools or on the box that it was three-cord, did you?

A. No.

546 X Q. And you left the public to infer what you meant from

the manner in which you had used the word "Standard" on your spools of sizes under 100; wasn't that so?

A. The public could understand whatever they chose from the words "American Standard machine thread" on this exhibit.

547 X Q. You didn't care what they inferred, did you?

A. Yes; we wanted them to infer it was a good thread.

548 X Q. Did you want them to infer it was the best thread of the size?

A. I wouldn't say we wanted them to infer it was the best thread made; we wanted them to infer it was a good thread of the kind.

549 X Q. What were your duties in connection with the Merrick Thread Company before you became president on the 1st of January, 1874?

563 A. I was director in the company.

550 X Q. What branch of business did you attend to?

A. I used to buy cotton. I used to go to the mill quite often to see how the machinery was running and consult about getting new machinery and building new mills and about various matters connected with the manufacture of spool cotton.

551 X Q. Did you have anything to do with the selling of spool cotton or superintending its sale?

A. No; I had nothing to do with the selling of the spool cotton from any of the agencies any more than to talk about what price they were getting and to help fix the prices that they should be governed by in their sales with the other officers of the company.

552 X Q. Was it a part of your business to keep yourself informed as to the monthly or annual production of the different kinds of spool cotton by your company?

A. We used to have a report at the different meetings of the directors of the quantity and kinds that we were making, and I used to look into it individually myself, more or less, when I was at the mill.

553 X Q. Can you state approximately what the production of your company was in the three-cord spool cotton in each of the years prior to the latter part of 1868 or the fore part of 1869, when you commenced making six-cord thread?

(Question objected to as immaterial and irrelevant to any of the issues raised in the pleadings and as unwarranted by the direct examination, and the witness is instructed that he need not answer the question until directed to do so by the court unless he chooses to answer it.)

A. I can't see what it has to do in this case, and so refuse to answer.

554 X Q. Could you answer if you wished?

(Same objections and instruction.)

564 A. Of course I could answer.

555 X Q. Can you and will you state approximately the annual production by your company of 200-yard six-cord thread in each year since 1868?

(Same objections and instruction.)

A. I think that is inquiring too much about the internal workings of our business.

556 X Q. Could you state if you wished?

(Same objections and instruction.)

A. That question is approximately, is it not?

557 X Q. Yes; approximately from your present knowledge and without reference to books.

(Same objections and instruction.)

A. I couldn't tell very closely.

558 X Q. Can you do so approximately?

(Same objections and instruction.)

A. I don't think I could.

559 X Q. Could you do so by referring to the books of the company?

(Same objections and instruction.)

A. Am I obliged to answer this last question?

(Defendants' counsel calls attention to objections and instruction already given.)

I prefer not to answer any more questions in that line until I am directed to do so by the court.

560 X Q. Can you state approximately the amount of production of six-cord thread, 200 yards, in any one year subsequent to 1868?

(Same objections and instruction.)

A. I prefer not to do so unless ordered by the court.

561 X Q. Do you decline to do so?

(Same objections and instruction.)

565 A. I do unless ordered by the court.

562 X Q. Do you know anything about the amount of annual production or sales of six-cord thread by the complainants in this case?

A. Not definitely.

563 X Q. Approximately?

A. I have a general idea of the quantity of spool cotton produced by them.

564 X Q. About what is your idea, say, for the last year of six-cord thread, 200 yards?

A. My idea would be that they put up somewhere between three and four hundred cases a day, containing a hundred dozen each.

565 X Q. That is about how many million spools a year?

A. Three hundred and fifty cases in a day, a hundred dozen in a case, makes 35,000 dozen a day; taking three hundred working days for a year, it makes 10,500,000 dozen, and twelve spools in a dozen makes 126,000,000 spools, if I figure correctly.

566 X Q. Would you undertake to say that you are correct in your estimate of the annual production of Messrs J. & P. Coats within 25 or 30 million spools? I understand you were referring in your last answer to the production and sales in this country and my question refers to the same.

A. I couldn't say that I was within twenty-five millions. I suppose their production would vary like all others in different years.

567 X Q. What do you suppose the sales of 200-yards six-cord spool cotton amounted to in this country in the past year by all makers?

A. I should place the amount at about twelve million dollars.

568 X Q. I mean the number of spools.

A. That would take considerable figuring.

569 X Q. Do you mean that you haven't thought of the matter as yet?

A. I have thought a great deal about it.

570 X Q. Can't you tell what you have thought about it without figuring?

566 A. You asked me a definite question. I am trying to think it out for you.

571 X Q. After figuring please answer question 567 X Q. in spools.

A. I think the average price per spool would be a little less than four cents, and on that basis I would make the sales amount to about three hundred million—that is, at four cents, twelve million dollars would make three hundred million spools.

572 X Q. What do you suppose the annual sales in this country by all makers of 200-yard six-cord cotton amounted to, stated in spools, ten years ago, in 1875 or 1876?

A. Probably ten or twenty per cent. less; that's the best of my opinion.

573 X Q. Have you any means of approximating the number of such sales at that time?

A. No; no more than a general idea.

574 X Q. What is your "general idea" based upon?

A. Talking with the people who sell it, and the sewing machines coming more into general use.

575 X Q. Well, what is there in those sources of information which makes you state the amount you have done in the answer to the 572 Q.?

A. The information I got from them, and because the sewing machine has become more generally used and the population had increased.

576 X Q. Have you any means of knowing approximately the amount of production of the different concerns who were selling thread in this country, say, in 1875 or 1876?

A. We have a general way of talking over amongst thread folks about how much each one is producing; nothing definite.

577 X Q. Could you give any kind of an approximation to the amount of production of the different concerns who were selling thread in this country in 1875 or 1876?

A. No more than I have stated. I think the production
567 now is about as I have stated and the percentage less in 1875 or 1876 is as near as I could form an opinion.

578 X Q. Have you any means of knowing approximately the amount of production of the different concerns who were selling thread in this country ten years earlier, in 1865 or 1866?

A. No; I have no particular means of knowing any more than a general opinion. Of course, that was a long time ago, and that would be very indefinite.

579 X Q. Would you undertake now to make any approximation whatever as to the amount of sales by any concern or concerns in this country in 1865 or 1866?

A. I couldn't tell anything about it only in a general way. According to the number of people that is the only approximation I could make. It would be very indefinite.

580 X Q. Would the "number of people" enable you to approximate in any way the production of any particular concern or concerns at the time named?

A. No, sir; the number of people wouldn't enable me to approximate what any one concern made.

581 X Q. Have you any means of approximating or forming an opinion upon the amount of production of any concern or concerns at the time mentioned?

A. You mean in this country?

582 X Q. In this country.

A. You mean thread manufactured in this country?

583 X Q. I mean thread either manufactured or sold by any concern in this country.

A. At what date?

584 X Q. In 1865 or 1866.

A. I think I have means of knowing what the Merrick Thread Company made in 1865 or 1866.

585 X Q. Can you approximate or have you any means of forming an opinion as to the amount of sales or production by any other concern in those years?

568 A. No, sir; I have no means of knowing what the others made or sold in those years.

586 X Q. Nor any means of forming an opinion upon the subject?

A. I could form an opinion, but that might be different considerable from the fact.

587 X Q. I asked you if you had any means of forming an opinion; if so, what are they?

A. I had no means except in a general way, as I was in business and sometimes inquired about spool cotton and talked about it. In 1866 I was director of the Merrick Thread Company. We frequently talked over the different makes of spool cotton.

588 X Q. What I asked you was whether you now have any means of forming an opinion upon the subject of the amount of production or sales in this country by any concern other than the Merrick Thread Company in 1865 or 1866.

A. I have no means except I could go back and get the number of spindles they were running at that time or inquiring of them how much they were making at that time.

589 X Q. Have you made any such inquiries?

A. No.

590 X Q. Have you ascertained how many spindles any concern were running at that time?

A. No; I have not ascertained.

591 X Q. Are you any better off as to information in regard to the amount of production by any or all concerns in the year 1867?

A. No; I don't know that I was particularly.

592 X Q. Are you any better off now as to information or means of forming an opinion in regard to the production or sales of any or all concerns in spool cotton in the year 1868 than you are as to such production and sales in the years 1865 and 1866?

A. I think the longer we have been in the business I have learned and talked over more about the production and the growth of the business and manufacture of spool cotton; and in that way I might give a better idea of the production in 1868 than in
569 1865, although I don't think there would be much difference.

593 X Q. Can you give me any idea of the amount of production or sale of any of the different concerns who were selling 200-yard spool cotton in 1868?

A. I could give the sales of the Merrick Thread Company approximately.

594 X Q. Can you give me any idea as to the amount of such sales in this country by any other concern or concerns in that year?

A. No.

595 X Q. Are you any better off as to the year 1869?

A. I couldn't tell what the sales of the other companies were.

596 X Q. Question repeated.

A. No.

597 X Q. Are you any better off as to the year 1870?

A. All I can say is that the longer I was in the business of making spool cotton the matter of the different makers was talked over more and I became more acquainted in relation to the different makers, and that is the only way in which I could be said to be any better off. If Mr. Betts considers I should be any better off in that way, then I answer yes.

598 X Q. Are you any better off now as to the year 1870 than the year 1869?

A. I think the longer we have been in the business I have gradually come to have a better idea as to the different makes—of the quantity.

599 X Q. Can you give me any idea as to the amount of production or sales of any of the different concerns (except the Merrick Thread Company) who were selling 200-yard spool cotton in 1870?

A. No; I could give no particular idea.

600 X Q. Could you give a general idea? If so, do it.

A. I could give an idea that they made and sold spool cotton; the quantity I couldn't say how much.

601 X Q. Have you, to your recollection, had within a year past any means of forming an opinion upon the subject?

570 A. Nothing more than probably we have talked over the growth of the business and the different concerns.

602 X Q. Do you remember any such talks?

A. I think I have talked it over with Mr. Palmer within a year.

603 X Q. Do you remember any information that he gave you on the subject?

A. Nothing more than that he thought the increase of the consumption of spool cotton did increase faster since the sewing machines have come into use.

604 X Q. Do you think you have had within a year past any information on the subject of the production of any concerns in 1865, 1866, 1867, 1868, or 1869?

A. I couldn't say whether we talked about those years or not. I don't recollect it now. We might have talked about those years and we might not.

605 X Q. Have you any better or further information in regard to the production or sale of any concern or concerns in 1871 than you have as to 1870?

A. No more only in the way I have stated. The longer I was in the business I became more familiar with the different makes by coming in competition with them in the market.

606 X Q. Won't you please confine your answers to the knowledge you now have or that you have had within a year past, and please answer the last question with that understanding?

Question 605 X Q. re-read.

A. I have answered that question as well as I can.

607 X Q. Can you give me any idea as to the amount of annual production or sales of any of the different concerns who were selling 200-yard spool cotton in any year from 1870 to 1880? If so, please give all your information upon the subject in your answer.

A. I could give no idea only in a general way, being in the business and keeping posted as well as we could about each concern and about what each concern was making.

571 608 X Q. Well, give me your idea as to what each concern was making in each year from 1870 to 1880.

A. In each year?

609 X Q. Yes; in each year separately.

A. Well, I couldn't do it.

610 X Q. Can't you give me any idea on the subject as to any year or any concern other than your own?

A. I can give an idea about how much was produced, but I couldn't go into the different concerns to calculate very near how it was divided.

611 X Q. Could you calculate or give any idea at all how it was divided in any year?

A. We have a general idea, as I have said before several times,

about how many spindles each concern are running, and in that way we have some idea probably of their production.

Adjourned to October 15, at 11 a. m.

NEW YORK, *Oct.* 15, 1886—11 a. m.

Met pursuant to adjournment.
Present: Counsel as before.

Continuation of cross-examination of LYMAN R. HOPKINS:

(In answer to X Q. 523 the witness produces two spools, one of 1,200 and one of 2,400 yards, with labels.
Complainants' counsel offers them in evidence and they are marked "Complainants' Exhibits Defendants' Long-Length Paper Label Spools."
The witness also states that in accordance with his answer to 521 X Q. he has written to the mill to find out the information asked for in that question.)

572 612 X Q. Have you formed any opinion in regard to the number of spindles which all the concerns in the United States together were running, say, in 1877 for the manufacture of 200-yard six-cord thread?

A. I have a general opinion. I should have to go into a calculation to get it more closer, and might not get it very correct even then.

613 X Q. Please state your opinion on that subject.

Question re-read.

A. Well, I think that the Willimantic were running at that time. George Clark, of the Clark Thread Company, whose mills are at Newark. Conant Thread Company at Pawtucket, Rhode Island. Ourselves, the Merrick Thread Company. I couldn't say whether the Mile-end Clark Thread Company (John Clark, Jr., & Co.) were spinning their yarns in this country at that date. They were winding spool cotton at Newark, but I think the thread was manufactured in the skein in England. There has been quite a large increase in the number of spindles in this country to spin the yarn to make spool cotton. I couldn't say the exact dates that the different companies have added to the number of their spindles, but I should think they had been nearly doubled since that time to the present, and at the present I should think there were spindles enough to make about the quantity I have before stated.

614 X Q. Won't you please state the number of spindles in the aggregate that you think were being run in this country in 1877, for the manufacture of 200-yard six-cord thread?

A. You mean the number of spinning spindles to spin the single yarn? I will give you my approximate estimate.

615 X Q. I don't know how you are accustomed to consider the work done by the spindles. What I want from you is your opinion, if you have any, upon the number of spindles in use at the time for

the purpose of getting at the total production in the country at that time. Please state it in your own way.

573 A. I should say from 175 to 200 thousand spinning spindles were running in this country for the production of six-cord thread at that date. That is my best judgment on that question.

616 X Q. Please state how you apportion those between the different manufacturers that you name that were running at that time.

A. I calculate that the Willimantic were running at that time for six-cord thread about thirty thousand spindles; the Merrick Thread Company about fifteen thousand spindles; the Conant Thread Company about one hundred and thirty thousand spindles, and the George Clark Thread Company about one hundred thousand spindles. That makes about 175 thousand spindles. As I have said before, whether Mile-end Clark were spinning in this country at that date I couldn't say. They were winding thread in this country, but I think the yarn was spun in England or Scotland at that time.

617 X Q. According to your experience, what is the average annual production of a thousand spindles making 200-yard six-cord thread? Give the answer in the number of spools.

A. That would depend entirely on the number or size of thread put on the spools.

618 X Q. Give the average for the numbers under 100.

A. We have found that the average number of spool cotton consumed in this country, taking in all the numbers that are sold for six-cord, averages about No. 50. The New England and Middle States average about No. 60 at the present time; the Southern and Western States average about No. 40, and we divide the two and call the general average No. 50. Now I will give you a statement of what a thousand spindles would make in one year of average No. 50 six-cord thread. The yarn to make No. 50 six-cord thread is first spun No. 100. A spinning spindle on No. 100 will spin in one day of ten hours about three skeins. That would be 3,000 skeins

574 in one day, and reckoning 300 days to the year, which is about the number we run, that would make about 900,000 skeins per year. Now it takes 100 of those skeins to weigh one pound. That would make 9,000 pounds of No. 50 thread in the skein. One pound of No. 50 thread in the skein will make five and one-half dozen spools of thread. That would make, if I have made no mistake in my figures, 49,500 dozen.

619 X Q. Then would you say that according to your experience the average annual production of 1,000 spindles is 594,000 (in round numbers 600,000) spools?

A. I would of No. 50 thread, six-cord thread.

620 X Q. And do I understand you to say that No. 50 may be fairly taken as the average for all the numbers?

A. We have found, as I have stated before, that that number was as near the average as we could calculate.

621 X Q. Now tell me from the above calculations that you have made about what the production was in spools of 200-yard six-cord thread by all the spindles in this country in 1877.

A. Those spindles would make, if I have made no mistake in my figuring, 103,950,000 spools.

622 X Q. How do you make that calculation?

A. I say if a thousand spindles would produce 594,000 spools how much will 175 thousand spindles produce, and I do it by the rule of three.

623 X Q. Now, what do you estimate was the proportion in 1877 of the 200-yard six-cord thread which was spun in this country to the whole amount sold?

A. I couldn't get at that very closely, because I don't know whether the Mile-end Clark were spinning their yarn or some of it in this country at that time.

624 X Q. Please assume that they were not and give me your estimate of the total sale in this country of 200-yard six-cord spool cotton in 1877.

575 A. Well, now, if I understand you you mean that I am to give you my estimate of the quantity of 200-yard six-cord spool cotton sold in the United States in the year 1877?

625 X Q. That's it exactly. Please do so, giving your answer in the number of spools.

(The witness makes a calculation.)

A. My estimate would be from 158 million to 180 million.

626 X Q. Please state how you apportion the difference between 103,950,000 and 158 to 180 million between the different makers.

(Witness makes a calculation.)

A. My idea is that the Mile-end Clark Thread Company was not spinning their yarn in this country at that time, and that the Conant Thread Company were importing some of their yarn, and my idea is that the George Clark Thread Company were importing some of their yarn and our own company were importing some of their yarn, and I calculate altogether they were importing yarn enough to make 54,975,000 spools, which makes the difference between the amounts stated. The proportion divided among the separate companies, I couldn't give a very accurate opinion.

627 X Q. Give the proportionate amounts sold by the different companies of this 54,975,000 spools in 1877 as nearly as you can estimate.

A. Well, I should think the larger portion of it very much was sold by the Mile-end Clark Thread Company.

628 X Q. Couldn't you give the number of spools for each one?

A. I couldn't go into that. I will answer in a general way.

629 X Q. Give the number of spools, as nearly as you can estimate, for the different concerns.

576 A. I should think the Mile-end Thread Company would make from two-thirds to three-quarters of that and the other companies that I have named the balance. Probably the George Clark Company and the Conant Thread Company would be somewhere near equal and our company considerably less than

either of them and the Willimantic Company but very little. I think that is a fair answer.

630 X Q. Won't you for greater clearness give the amounts of the several concerns in spools?

A. I think that is as clear as I can make it.

631 X Q. Don't you know how much your concern ought to be credited with out of that amount?

(Same objection and instruction as to question 553 X Q.)

A. I would rather not make any answer unless directed by the court to do so.

632 X Q. Would you kindly give me an estimate in number of spools you think the Conant Thread Company and the George Clark Thread Company were selling of that 54,975,000?

(Same objection and instruction as to question 631 X Q, because involving a disclosure of the quantity made by the Merrick Thread Company.)

(Witness makes same answer as before.)

633 X Q. Do you mean to be understood by your 629th answer that the George Clark Thread Company and the Conant Thread Company together were selling pretty nearly all of the balance of the 54,975,000 not sold by the Mile-end Clark?

A. I should say they were selling more than one-half of the balance. I am referring to twisted yarn made in the cop or twisted into thread and in the skein that was imported.

634 X Q. Wasn't any of the Orrs & Macnaught thread being sold in this country in 1877?

A. There might have been a very little. I couldn't say certain.

635 X Q. About when did they stop making six-cord thread?

577 A. Well, sir, I couldn't answer that; they may be making it to-day; that thread was made in England.

636 X Q. About when did the sales of the Orrs & Macnaught thread, to any considerable amount, cease in this country?

A. I should say from 1865 to 1868.

637 X Q. Have you ever known of its sale since that time?

A. Yes.

638 X Q. When?

A. I have bought some spools since then. I have bought some within two years.

639 X Q. Has it been on the market except in the case of old stock left over since about 1865?

A. I should think it gradually went out as a popular thread from 1865 to 1868. I don't think it has been very plenty since then.

640 X Q. Has there been any agent for it or regular dealer in it in this country since 1865, to your knowledge?

A. Alexander Knox was the agent in this country for the Orrs & Macnaught thread. I think he is still living; but the date when he ceased to be the agent I could not give.

641 X Q. Do you think it was between 1865 and 1868 that he ceased to be the agent?

A. I couldn't give any date; but I will say he will probably be put on the stand by the Coats people or by us.

Adjourned to Oct. 18th, 1886, at 12 a. m.

578 NEW YORK, *Oct.* 18, 1886—3 p. m.

Met pursuant to adjournment.
Present: Counsel as before.

Continuation of cross-examination of L. R. HOPKINS:

The witness states: "Where I gave the estimate of the spindles that each concern would take to make the quantity of thread in 1877, in adding them together it should be 275 instead of 175 thousand spindles, and all amounts based on those spindles at that time should be calculated accordingly."

642 X Q. Have you any means of forming an opinion as to the number of spindles in use by the different makers in this country or as to the aggregate amount of sales in this country by all makers in the year 1871?

A. Only in a general way, as I was in the business and we had a general idea of about what was being produced.

643 X Q. Please state what, in your opinion, were the aggregate sales of 200-yard six-cord thread in 1871 and how they were apportioned between the different makers or dealers.

A. I couldn't give a very near estimate about that, especially the dealers I couldn't tell but very little about; there were thousands of them; the aggregate amount in 1871, I should say, was from seven to ten million dollars' worth.

644 X Q. Please give your answer in spools and please apportion the aggregate which you fix upon, as nearly as you can, between the different makers of thread, if you have any judgment upon the subject at all.

A. The price of spool cotton, at about that date, would average somewhere about fifty cents a dozen; if you want the amount
579 figured out in spools that I have said the sales come to I will get some one to do it or do it myself and give you the amounts at the next session; it will take too much time to calculate the amount in spools to make that amount in money to go into it now. I consider the Coats people were probably making at that time about one-half, between one-third and one-half, and George A. Clark one-quarter; Mile-end Clark, Willimantic, Merrick Thread Co. were making the balance or substantially so.

645 X Q. Can't you be any more specific than that?

A. No.

646 X Q. Can you be any more specific as to the years 1872, 1873, 1874, 1875, or 1876?

A. No. We had a general idea—nothing specific—somewhere about what different concerns were doing. They varied in different years some.

647 X Q. Can you say whether or not the apportionment you have attempted to make between the different makers was substan-

tially varied from your statement as to the year 1871 in either of the other years inquired about?

A. There was a gradual growth in our concern of six-cord thread during those years, and, judging from that, I suppose it was much the same with the others.

648 X Q. Can't you be any more specific than that?

A. No.

649 X Q. In your direct examination you have spoken of the number and size of the mills which your company now have at Holyoke, and have compared it with the number and size of your mills when your company was first started, as I understand. Will you please state the dates at which you added to your mills and increased the number of your spindles?

A. I couldn't do it now. We have increased at several different times. I couldn't give the dates now, but I think I could get them.

650 X Q. Could you state about how many thousand spindles your company was running at the commencement of the year 1878?

580 A. My impression is that we were running about 20,000 spinning spindles, but we were twisting for at least ten to fifteen thousand more spinning spindles.

651 X Q. You were running with the large portion of imported yarn then, as I understand it?

A. I think at that date we had not started our Appleton-street mill, and the finer yarns we bought at that time.

652 X Q. In your answer to 11 Q. you said that at the present time your company are running about fifty thousand spindles. Did you mean spinning spindles or twisting spindles or both?

A. I meant spinning spindles.

653 X Q. Do you twist any yarn that you do not spin now?

A. Yes.

654 X Q. About what portion?

A. We twist about what seven or eight thousand spindles would spin.

655 X Q. The great growth of your company has been since the year 1878, has it not?

A. No; I don't think it has. The sales since 1870 have been very gradual—the increase each year. One or two years I think there was a little falling off from the year previous. All the others have been a gradual increase.

656 X Q. Will you kindly state the amount of your production from year to year, commencing with 1865?

A. I think that is going into our business a little too much, and I shall decline to answer it unless instructed to do so by the court.

657 X Q. Won't you state the amounts of your production in each year generally so as to enable us to see whether you are correct in your previous statements as to the progress of your company?

(Defendants' counsel object to the question as not opened by the direct and as calling for an unnecessary disclosure of private business; also as immaterial.)

581 A. I have stated that we commenced in 1865 with 10,000

spindles, or about that, and our business growth has been gradual, until we now have about 50,000 spindles.

658 X Q. Question repeated.

(Same objection.)

A. I couldn't state it any plainer than I have; it has been gradual from that time to the present.

659 X Q. Do you mean you don't know the amounts or that you decline to state them?

A. I don't mean to say that I couldn't find out the amounts, but I decline to give the amounts of each year separately unless instructed to do so by the court.

(Defendants' counsel instructs the witness that he is justified in taking the position that he has if he deems it a disclosure of the private business of the company to a business rival that would be injurious to his company, the question being entirely immaterial to any issue at final hearing in this case.)

660 X Q. Will you please produce your books and state from them the amounts called for in the 657 X Q.?

(Same objections and instruction to the witness.)

(Witness makes no answer.)

661 X Q. In your answer to the 16th question you mentioned the names of several brands of thread which were in the market in 1865 and said that one or more of them "came into the market about that time;" please state which of the brands mentioned by you you intended to say came into the market about that time.

A. George Clark's O. N. T.

662 X Q. Not the Willimantic?

582 A. I didn't refer to the Willimantic in that answer.

663 X Q. What did you know about the Orrs & Macnaught thread in 1865?

A. I knew it was in the market, being sold.

664 X Q. Did you know anything about the amounts of its sales?

A. Nothing more than it was quite a popular thread, and I heard it talked about and spoken of as being a good thread in different parts of the country.

665 X Q. What is the explanation of the Orrs & Macnaught thread going out of the market?

A. I couldn't say.

666 X Q. Has the J. J. Clark & Company thread gone out of the market?

A. I think it has.

667 X Q. Since when, about?

A. I couldn't tell you.

668 X Q. About how long ago is it that it ceased to be sold to any considerable extent?

A. I couldn't tell you; I never saw much of it.

669 X Q. Had it about gone out of the market in 1865?

A. I couldn't say.

670 X Q. Did you ever see any of it in the market in 1865?

A. There have been so many Clarks connected with spool cotton that I couldn't say when the changes have been made.

671 X Q. What other brands of thread were there in the market in 1865 in addition to Coats', the Willimantic, George Clark's O. N. T., J. J. Clark & Co., and Orrs & Macnaught?

A. There was the Mile-end Clark.

672 X Q. Any others?

A. Do you mean six-cord?

673 X Q. Answer as to six-cord first.

A. I couldn't say whether the Williston were making at that time or not; but I think not.

674 X Q. Were there any others that you know of?

583 A. None that I recollect of at present.

675 X Q. What other brands were there of three or four cord at that time?

A. Stafford's, Greene & Daniel's, and several other small concerns; I don't remember the names just at present.

676 X Q. A day or two since you made some statement on cross-examination in regard to the length of time required to spin or wind the finer numbers of thread. Please state what the facts are in regard to that.

A. The spinning of very fine yarn is a very slow process, and with us after it comes from the mule, which is the first spinning operation, we place it in a damp place, and it stays there for six weeks to season, as we call it; then we have to spool and twist it, which is a very slow process in those fine numbers; then it has to go through the various departments of bleaching or coloring, and so on through till it comes out spool cotton.

677 X Q. What do you mean by "those fine numbers"?

A. I mean yarn from No. 100 up.

678 X Q. Why is the process of spinning and twisting those high numbers longer than the process of spinning and twisting coarser numbers?

A. Because there has to be so much more twist to the length.

679 X Q. Why is that?

A. If I understand you, you ask me why there has to be more twist in fine numbers than in coarse numbers.

680 X Q. Yes.

A. There has to be more twist to give it strength in fine than in coarse numbers.

681 X Q. Do you mean to say that the labor and time is progressively increased in the case of the different numbers of thread the higher you go?

A. That's what I mean to say.

682 X Q. Is there any greater labor or time involved in bleaching the high numbers than the coarser ones?

584 A. Not particularly; there has to be more care.

683 X Q. How about the seasoning process you speak of? Does that have to be gone through with in the coarser numbers?

A. Not necessarily; I think it would improve it.

684 X Q. Can you tell me how much more time and labor it would involve to make, say, a thousand spools of No. 140 spool cotton than it would to make a thousand spools of No. 70 spool cotton?

A. No; I don't know as I could at present; I will give you a general idea of what I mean by the greater cost of making fine thread; that I suppose will be sufficient; twisted thread in the skein is generally spun and twisted, the price being paid by the skein of 840-yard lengths to the skein, and the price varies according to the number, generally being about a half a cent a skein; what I mean is that No. 20 would be ten cents a pound (twenty skeins) and No. 40 would be twenty cents a pound (forty skeins); that would be half a cent a skein for each; the finer numbers are more difficult to make, require more care, attention, and take many more spindles to spin the same lengths or number of skeins in the same time.

685 X Q. At the average price which you have mentioned of about four cents a spool there is a great deal more profit on the making of the coarse numbers than on the making of the fine numbers, is there not?

A. No; there is four times as much stock in the coarse ones.

686 X Q. Is there any more profit in making the coarse numbers than the fine, or *vice versa?*

A. We don't consider there is any profit on the coarsest numbers at all—8 and 10, I mean.

687 X Q. Why?

A. Because there is so much raw stock, cotton, consumed in making them.

688 X Q. And so little made?

A. Oh, no; we make a great deal of it.

585 689 X Q. Does it make any difference in the cost of manufacturing if you only have a small quantity of a given number to make?

A. I should think it would.

690 X Q. Do you consider that you make any profit on your No. 100 thread?

A. We try to, and think we do, a little.

691 X Q. Do you on No. 110?

A. I would state for the information of counsel that the two ends, the extreme coarse and the extreme fine, are the two ends that we do not make much of anything, if anything at all.

692 X Q. Question repeated.

(Objected to as immaterial.)

A. I think I have answered that as well as I can.

693 X Q. Do you on No. 120?

(Same objection.)

A. I should answer that in the same way.

694 X Q. Can you give any more specific answer as to No. 130 or No. 140?

(Same objection.)

A. No, sir; any more than that the higher we go the less we make, if we make anything at all; I mean in six-cord thread.

695 X Q. When you were making your high numbers 200-yard spools of three-cord thread, did you make any profit on the numbers above 100?

(Same objection.)

A. We did what few were sold for six-cord price.

696 X Q. And if you sold any at what you call a three-cord price did you make a loss?

(Same objection.)

A. I don't think we did.

697 X Q. Do you know anything about it?

(Same objection.)

586 A. I think we can make a profit on three-cord thread from 100 to 150 at the regular three-cord price.

698 X Q. How much?

(Same objection.)

A. At twenty-five cents a dozen.

699 X Q. How much profit at that price?

(Same objection.)

A. I ain't prepared to go into that at present; I shan't go into that; I decline to go into that until instructed.

700 X Q. Don't you know?

(Same objection, and the witness is instructed that he is justified in refusing to answer as to such details of his business and of the profits of his company as are immaterial to the issues herein and the disclosure of which to a business rival would in his judgment cause financial loss to his company.

Complainants' counsel calls attention to the fact that the present question calls for no such disclosure, and that the instruction is obviously premature.)

A. I could tell, but I refuse to do so unless instructed by the court.

Adjourned to October 20, 1886, at 2 p. m.

587 NEW YORK, *October* 20, 1886—2 p. m.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of cross-examination of Mr. HOPKINS:

701 X Q. Has your company ever made four-cord thread?

A. Yes.

702 X Q. When—during what period?

A. Making it now and have made it for ten years.

703 X Q. What numbers and lengths of spool?

A. I think we make from No. 20 to 50 and I think the most of it, if not all, is on longer lengths than 200-yard spools.

704 X Q. Will you produce samples of spools and labels used on your four-cord thread?

A. I can produce spools. I think they are all stamped on the end. I don't think we use any labels.

705 X Q. Will you produce them at the next session?

A. Yes.

706 X Q. Of what number of yarn is No. 100 three-cord thread made?

A. It ought to be made of No. 100 yarn.

707 X Q. Is that the way your company makes it?

A. I think it is

708 X Q. Have they always done so, so far as you know?

A. Yes.

709 X Q. Of what numbered yarn did your company make its three-cord No. 110 thread?

A. I think all our fine numbers of three-cord thread were made on the number of the yarn, or very near that. I mean from a number of single yarn corresponding in number to the number of the thread.

588 710 X Q. What do you mean by "very near that"?

A. I mean that quite often those fine yarns will vary some when we spin them as near as we can to the number we wish to make.

711 X Q. Isn't it easy to spin the fine yarns to any required number?

A. The finer you go in the count, as we call it, the more difficult it is to make it right on the number you wish.

712 X Q. Why so?

A. Because it is very difficult on account of the atmosphere and getting your machinery perfect and getting the finest cotton at all times.

713 X Q. Is any finer cotton required to spin the fine yarns than the coarser yarns?

A. Yes.

714 X Q. What kind of cotton do you mean by finer cotton?

A. I mean there are several grades of fineness in sea island cotton, and for the finest yarn we have to select the finest cotton or cotton that has the finest fiber.

715 X Q. Are the grades with the finest fiber more expensive than the grades with the coarser fiber?

A. Yes.

716 X Q. About how much more expensive?

A. I have seen samples of sea island cotton that was sold as high as a dollar a pound on account of its fineness when other grades at the same time were sold as low as thirty-five cents.

717 X Q. Do I understand you to mean by your previous answers that in making your No. 140 three-cord thread, for instance, you made it out of three strands of yarn spun as nearly as you could get it to No. 140 fineness?

A. That's what I mean, if it were made from our own spinning.

718 X Q. How fine can you spin yarn; up to what number?

A. Well, I wouldn't like to say how fine I can spin it; of course I never tested that point.

589 719 X Q. How fine have you tried to spin it?

A. I think we have spun some as fine as 160, and probably some little somewhat finer.

720 X Q. It is a pretty delicate operation spinning yarn as fine as No. 160, isn't it?

A. Well, there is more trouble than there is in spinning the coarser numbers.

721 X Q. Question repeated.

A. That would be according to what meaning you put to the word "delicate."

722 X Q. Don't you consider it what you would call a delicate operation?

A. I should think the word "difficult" would convey my idea about it better than the word "delicate."

723 X Q. Why is it difficult?

A. Because all the arrangements in the different machines which it goes through in the process have to be adjusted very accurately and in the best of order.

724 X Q. Are the different numbers of thread expected to come up to a certain gauge as to size; if so, how is that regulated?

A. When thread was first commenced to be manufactured, so far as I know, it was all made three-cord, and it was numbered according to the number of the yarn that it was made of or twisted from—that is to say, No. 20 thread was made of three strands of No. 20 yarn, and so of any other number. When they commenced to make six-cord thread the number corresponding to the size was not changed; consequently the yarn that it was made of had to be just twice as fine.

725 X Q. Are the different numbers of thread run through gauges to determine whether or not they are up to their proper size or number?

A. I think not.

726 X Q. How do they determine the size, simply by the number of the yarn?

A. By the length and weight.

590 727 X Q. Is it true that three-cord, four-cord, and six-cord thread of the same number are, or ought to be, of the same size, irrespective of the number of cords?

A. They ought to be.

728 X Q. And in the case of your manufacture are they so?

A. I couldn't say that they all were.

729 X Q. Do you endeavor to make them so?

A. I think we do.

730 X Q. Are they so, so far as you know?

A. I think the four-cord have generally run a little coarser than they would really size—that is, weigh under a given length.

731 X Q. Which kind of thread would run a little coarser, three-cord or four-cord or six-cord?

(Witness desires to say that from 729 X Q. on I understood the questions were in relation to four-cord thread only.)

732 X Q. Now, please tell me whether your company endeavor to make their six-cord and three-cord thread of the same number, so that they will be the same size?

A. I think all the medium numbers we endeavor to make of the same size; the coarse end is probably a little finer and the fine end probably a little coarser than it is in the three-cord.

733 X Q. What do you call the medium numbers?

A. Thirty to sixty.

734 X Q. Don't you endeavor to make your No. 110 six-cord of the same size as No. 110 three-cord?

A. I think it is a little coarser.

735 X Q. Question repeated.

A. No, sir; I couldn't say that we did.

736 X Q. Do you intentionally make all the higher numbers of six-cord thread above No. 100 coarser than they would be if made of three-cord?

A. I think we do, a little.

737 X Q. What numbered yarn do you use for No. 110 six-cord?

591 A. I think that is getting a little too much into the details of our business.

738 X Q. Do you mean that you refuse to answer?

A. Yes, sir, unless I am directed to do so by the court.

739 X Q. Why do you refuse to tell the number of yarn that you use for making No. 110 six-cord thread when you have freely told the number of yarn used by you in making No. 50, for instance?

A. Because I think it is going into our business affairs—our manufacturing—too much.

740 X Q. Why do you make a secret of that particular number?

A. Because I think that is something that he is not entitled to in relation to this case.

741 X Q. What other reason?

A. No other particular reason.

742 X Q. Why did you tell the number of yarn used for No. 50 thread upon the direct examination?

A. Because I thought he wanted to know.

743 X Q. Who wanted to know?

(Defendants' counsel directs the witness to make his answer personal to the questioner, using the pronoun "you" instead of "he" when the questioner is meant, and so less time will be likely to be occupied with needless questions.)

A. You.

744 X Q. Did I ask you any of the direct questions or did your own counsel?

A. You.

745 X Q. Whose witness do you think you are—for complainant or defendant?

A. Complainants' witness at present, I suppose, under cross-examination.

746 X Q. And whose witness do you suppose you were on the direct examination?

A. I was ordered to appear here by the defendants.

591¼ 747 X Q. Who "ordered" you? As I understand you, you are the president of the defendants.

A. I will change that "ordered" a little. I was asked to appear here by Mr. Witter, who is defendants' counsel in this complaint, for my direct examination.

748 X Q. Then it isn't true, as you swore in the answer to the 744 X Q., that I asked you any of the direct questions?

A. Read that. I don't know what he is trying to get out.

(744 X question and answer read to the witness.)

In answering the 744 X Q. I understood you, Mr. Betts, was asking me about my answers that I was then making—emphasize that "then"—and not what I am now referring to as the direct examination in this case.

749 X Q. Now, won't you please tell me why on the direct examination in this case you told without objection what yarn was used for No. 50 thread and yet now decline to tell what yarn is used on No. 110 thread?

(Defendants' counsel asks that witness be referred to that part of the direct examination that complainants' counsel has in mind.

Complainants' counsel refers the witness and the court to questions 33 to 36, in which the number and size of yarn used for making No. 60 thread—three-cord, four-cord, and six-cord—is given, and states that it seems to him that the implication which was sought to be conveyed to the court by those questions and answers was that No. 50 thread was "an example" of what would be found to exist in all the other numbers, whereas the present questions which the witness has refused to answer and his answers thereto as far as given seem to indicate that No. 50 thread is not a true

591½ "example," certainly in the case of the higher numbers; and complainants' counsel insists that the witness should answer the questions he can to show that fact.

Defendants' counsel states that the witness is not responsible for how the questions and answers 33 to 36 "seem" to complainants' counsel's mind and requests complainants' counsel to postpone his argument till the hearing of the cause.)

A. Because probably different makers in those fine numbers use different numbers of single yarn, and I think it is going into the details of our manufacturing too much.

750 X Q. What number of yarn do you use for the six cords of your No. 120 six-cord thread?

A. I decline to answer that question for the same reasons given to the one previous unless ordered to do so by the court.

751 X Q. Question repeated as to No. 130.

A. Same answer.

752 X Q. Same as to No. 140.

A. Same answer.

753 X Q. Do you know of any manufacturer in this country other than your own company who makes six-cord thread of a finer number than 100?

A. No, sir; not of my own knowledge. They may do it, but I don't know of it.

754 X Q. Or in any other country?

A. Not to my personal knowledge. I don't know what may be made in other countries.

755 X Q. Have you any reason to suppose that any other manufacturer in this or any other country ever made any six-cord thread finer than No. 100 except yourselves?

A. All the reason I have to suppose so is that we were asked for it and we made it, and I don't know why the same reason or cause might not have been in other countries.

756 X Q. Who first asked you for any six-cord thread finer than No. 100?

592 A. Our agents said they had a demand for it and asked us to make it.

757 X Q. What agent?

A. Mr. H. F. Palmer.

758 X Q. Anybody else?

A. Mr. Barr. I think they were the first. Since that Mr. Harvey and Mr. Still, of Chicago, have both ordered it.

759 X Q. Was Mr. Palmer's request for it in writing?

A. I couldn't say whether he told me or whether he wrote for it.

760 X Q. Mr. Palmer is one of the defendants in this suit, is he not?

A. Yes; I believe he is.

761 X Q. Who is Mr. Barr?

A. He is our Boston agent.

762 X Q. Was his request in writing?

A. I think I was in Boston and he told me to have some made. I think I carried the order to the mill.

763 X Q. Won't you please state, if you remember, exactly what Mr. Barr said on this occasion and all of it?

A. I can state in a general way. I can't give the exact language. I was in the office talking with Mr. Barr about fine thread. I told him to send back to the mill what he had in those fine numbers that were three-cord, and he said, as near as I can remember, that he had a demand for some fine numbers of six-cord thread, and that he would have to have some, and I told him we were making some numbers finer than 100, and that we would make some for him. That's as near as I can remember the conversation.

764 X Q. What were you saying to Mr. Barr "about fine thread"?

A. We were talking about fine thread. I can't remember the exact language any more than the substance in a general way.

765 X Q. Give the substance as nearly as you can.

593 A. I was asking him if he had any demand for fine numbers of thread—what they were used for; talking about it in a general way. That's about as good an answer as I can give.

766 X Q. What did he say to those inquiries of yours?

A. He said he did have inquiries for fine thread.

767 X Q. Much?

A. I don't recollect as he said much.

768 X Q. Do you recollect whether he said he had only a little?

A. I don't recollect that particularly.

769 X Q. Was it then that you told him that he must send back to the mill his stock of fine numbers of three-cord thread?

A. My impression is that it was at the time I was talking about, but I wouldn't say certain.

770 X Q. Did he say anything more specific than you have already stated?

A. I have stated the conversation as near as I can remember it.

771 X Q. Give Mr. Barr's full name and state how long he has been your company's Boston agent.

A. A. W. Barr. I couldn't state how long he has been our Boston agent without looking at some record. He was there at the time of the big fire.

772 X Q. Did you say anything to him on the occasion mentioned in regard to this suit?

A. I might have.

773 X Q. What did you say?

A. I don't recollect that I did, but I might have said something about it if it was since it commenced.

774 X Q. Weren't your inquiries of him in regard to the sales of fine numbers made with reference to this suit?

A. No; I don't think they were. I always ask our agents when I am at their places and get memorandums generally of what they want, and I think that was in the same way, and probably if it was since this case commenced there was something said about this case, as I have generally spoken about it with all of our agents ever since it commenced.

594 775 X Q. What do you do with the memoranda that you get of what your agents want?

A. Well, they are generally thrown into the waste basket after they have been copied. I think I have some in my pocket now. I may not; I generally have some in my pockets.

776 X Q. Copied in what?

A. I generally give them to our Origen Merrick—that is, give him the amounts and kinds; that's what I mean by being copied.

777 X Q. Does your company keep a book showing the orders from its agents and the sizes and quantities of thread ordered by them?

A. I think we generally do; probably it may not be all, but I think, as a general thing, they are kept.

778 X Q. Will you produce that book and show us how much 200-yard three-cord thread was ordered by your agents of the high numbers above 100?

A. I think that is going into the details of our business too far, and shall decline to furnish it unless ordered to do so by the court.

779 X Q. Tell me what occurred between you and Mr. Palmer at the time referred to by you, where you say he spoke to you about making some six-cord thread finer than No. 100.

(Questions 756 and 757 read to the witness.)

A. I don't know as anything occurred any more than he said he wanted us to make some for him. He thought he could sell it; he had a demand for it.

780 X Q. Had you been talking with him about the high numbers of 200-yard three-cord?

A. Probably I had.

781 X Q. Do you remember the substance of what you said?

A. I remember that I told him I thought we better make all our high numbers six-cord; at the time he told me he had a demand for six-cord in high numbers.

595 782 X Q. What else do you remember occurred between you at the time?

A. I think I told him that the other companies didn't make those high numbers in six-cord, and that I thought it would be better for us to do it; that it would be a good advertisement for us outside of the demand, or something like that.

783 Q. Nothing else?

A. We talked about it in a general way, but I can't remember the conversation any more than I have given. Probably this case now pending was spoken about. I can't remember the conversation.

784 X Q. Was the effect of making your high numbers six-cord upon this pending case discussed?

A. It might have been. I couldn't say. If we were talking about it, probably there was something said about that; probably there was something said about this case. I have talked with all our agents about this case. There might have been something said about this case; probably there was.

785 X Q. What effect did you think that the making of your numbers finer than 100 in six-cord thread would have on this case?

A. I didn't think it would have any effect at all; not at all. I thought it would be a good advertisement, as the others did not make it, and probably the bringing of this case brought it to my mind. I saw in their complaint that they claimed that all their thread on 200 yards was made six-cord, of six-cord separate strands, and, as I thought that was not so, it called my attention to that particular thread.

Adjourned to October 21st, at 2 p. m.

596 NEW YORK, *Oct. 21st*, 1886—2 p. m.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of cross-examination of LYMAN P. HOPKINS:

(Witness produces a sample of the four-cord thread called for in yesterday's deposition.

Complainants' counsel offers the same in evidence, marked "Complainants' Exhibit Defendants' Four-cord Spool.")

786 X Q. Was it ever suggested to you that it would be advisable, for its effect upon this suit, that your company should make the numbers of 200 yards above 100 from six cords?

A. Not that I recollect of.

787 X Q. Are your high numbers of six-cord thread twisted more tightly than three-cord, so as to bring the size of the thread down as nearly as practicable to the three-cord size?

A. We have our regular system of twisting our six-cord thread in all the numbers—that is to say, we put in so many turns to the root. We have to get the root in order to know the number of turns that we wish to put into a certain number, and that system is carried through all the numbers.

788 X Q. Won't you explain what you mean by "root"?

A. We get the cube root of the number and put so many twists to the root.

789 X Q. Do you mean that you find the cube root of a number which corresponds with the number of the thread to be made, and then, in order to determine the number of twists to be given in making any given number of thread, you multiply the standard number of twists by such cube root?

597 A. No; I will explain that all to you when I come again. There are a good many things I can't explain just now.

790 X Q. Isn't it true, however, that you do give to the high numbers a good deal more twisting than to the low numbers?

A. There is a great deal more twisting in the high numbers, but I don't think that there is any more in proportion to the size.

791 X Q. Does the amount of twisting that is given to thread effect its strength; and, if so, how?

A. Certainly; very slack twist would make it very weak; more twist, unless there was too much, would give it more strength.

792 X Q. Does the number of twists that are given to the yarn in spinning the thread effect the softness or hardness of the thread; and, if so, how?

A. Yes; the slack twist would be softer and the harder twist would be harder.

793 X Q. Why is it necessary to give more twist to the yarn in making the higher numbers of thread?

A. Because in making the higher numbers of thread they are made from finer single yarn, and the finer the yarn is the more twist it takes to give it strength.

794 X Q. You find it to be necessary, then, in order to give the

finer numbers of yarn sufficient strength to twist them more and to make them harder than you do the coarser numbers?

A. We have to give the fine yarns more turns to the inch. I couldn't say that it makes it any harder than it does in the other ones.

795 X Q. Isn't it probably true?

A. I should think not. I should think they would be just the same, with the same relative proportion of twist—the hardness. What I mean is that I think a spool of six-cord cotton, No. 50, with the same relative twist, would be just as hard as the numbers higher.

598 796 X Q. And do you think that your higher numbers above 100, when made of six-cord, are just as hard as six-cord No 50?

A. I should think they were unless, being so much smaller, in winding they might stretch a little, which might make them appear a little harder.

797 X Q. Is a three-cord thread harder or softer than the same number of six-cord thread?

A. I should think it was softer, unless it was what we call a "finished" thread—"glacé."

798 X Q. Is that true of all numbers?

A. I should think it was.

799 X Q. Do you know how much six-cord thread of numbers higher than 100 your company has sold since they commenced to make it at the time stated by you?

A. No.

800 X Q. Will you produce the book containing the orders of your agents for the different sizes of thread and show how much has been sold?

A. I think that is going a little too far into our business affairs, and I shall refuse to do so unless ordered by the court.

801 X Q. In your answer to direct question 52 you say that about six years ago you were in the packing-room at your mill and there saw a box of No. 110 thread "which had a label on the cover which read six-cord." Was that at the mill of the Merrick Thread Company?

A. Yes.

802 X Q. At Holyoke?

A. Yes.

803 X Q. Can you produce a sample of that label?

A. When I saw that label on that box I asked Mr. Morrison about it and he said that that was a label which belonged on a No. 100, but the No. 100 being not much smaller they had put the same label onto No. 110 box. I asked him if he put it on any other

599 numbers higher and he said he had not; I can bring a box of No. 100 if you wish it; that was the label that was on that box.

(Answer objected to as irresponsive and as volunteering hearsay evidence.)

804 X Q. Please produce the label that you saw on that 110 thread on that occasion.

A. I will produce one at the next session.

805 X Q. You say that you asked the foreman at the time if he put that label on any other higher numbers. What higher numbers than 110 were you making at the time?

A. I think we had put up a little as high as No. 140 or 150 and the numbers in between.

806 X Q. It was in reality all three-cord thread, was it not, from 110, inclusive, upwards?

A. Yes.

807 X Q. How many boxes of this 110 three-cord thread with the six-cord label on the box did you notice at the time of this interview six years ago?

A. I couldn't say. I saw one and I might have seen some more. The thread is put up ten dozen in one package, and in that shape they don't show the labels on the boxes.

808 X Q. Was the box or boxes that you particularly inspected taken from one of these packages?

A. I couldn't say; I don't recollect whether it was or not; it might have been taken out of one; I didn't take it out; I saw it on the shelf in front of the place where we keep the packages.

809 X Q. Did you have any other or further conversation with the superintendent at that time in regard to that thread or any of its labels?

A. We probably talked about the thread. I told him not to put those labels on the boxes of No. 110 any more, but to put up the 110 the same as they did the rest of the high numbers, as near as I can recollect.

810 X Q. Can't you remember anything else that was said on that occasion?

600 A. That's all that I can recollect at that time. We might have talked more; I don't recollect; it was some time ago.

811 X Q. Think again and see if you cannot recall something further that was said in regard to that thread by either you or the superintendent or any one else on that occasion.

A. I think I asked him why he put it up in that way, or something in that nature, or why he put that ticket on No. 110; probably that comes nearer to what I asked.

812 X Q. Did he or any one else give you any reason for doing so other than the statement that the box was nearly the size of that for No. 100?

A. I think he said that the other companies, thread-makers, were putting up boxes marked in that way, and I think he named the Willimantic and the Coats.

813 X Q. How does it happen that you can remember that statement in answer to the present question when you have denied in answer to the last two that you could remember anything of what was said except that which you had given in the 803 X Q.?

A. Because you told me to think again to see if I couldn't think of something that he said or I did on that occasion.

814 X Q. How do you suppose it happened, if it be true that the six-cord labels were put upon the 110 boxes because Coats and the Willimantic did it, that similar labels were not put on the higher numbers for the same reason?

A. We never had had any lithograph labels to go on the boxes finer than 100, and he did use the No. 100 on the No. 110 box, but the other boxes would have been so much smaller that we could not have used it; that is all the reason I could give that he might not have put it on the others as well as on No. 110. We never had any lithographic labels or covers finer than No. 100.

815 X Q. How long had you been making these fine numbers above 100 at the time of the conversation in question?

601 A. I couldn't say, but I think not very long.

816 X Q. At the time of seeing the box of No. 110 thread with the six-cord label on the box did you examine the thread and spools in the box?

A. No; I think not.

817 X Q. Have you sold much or little of your six-cord thread made in numbers above 100?

A. Our sales have gradually increased in those numbers since we commenced to advertise that we made them six-cord.

818 X Q. Question repeated.

A. We have sold a fair proportion, I should think, according to the quantity of the other numbers. That's as near as I can get at it.

819 X Q. Question repeated.

A. In answering that question it would depend entirely upon what you mean by much or little. If you will explain what you mean I will answer it as well as I can.

820 X Q. Don't you know what much or little means in that connection?

A. Only comparatively.

821 X Q. What you call a "fair proportion"?

A. Well, I should think for our trade from $\frac{1}{4}$ to $\frac{1}{2}$ of one per cent., taking in the aggregate of all the numbers of 200-yard six-cord thread.

822 X Q. Do you know that your company has sold as much as that of their high numbers of six-cord thread?

A. I couldn't tell exactly, as we don't keep any account of the particular numbers. The thread is billed so many dozen of six-cord without regard to the numbers, as they are all sold at one price.

823 X Q. You say you cannot tell "exactly." Can you tell at all?

A. I have a general idea in talking with our agents about it.

824 X Q. Do you know anything on the subject at all of your own knowledge?

A. I know they tell me that they sell it, and I know that we make it and send it to them.

602 825 X Q. Is that all you know on the subject?

A. They have given me the names that they have sold it to. I have asked them. They have told me the name.

826 X Q. Can you give me the number of spools sold in each year from the time you commenced the sales of the high-number six-cord thread?

A. No.

827 X Q. Have you ever heard it stated?

A. No; I have never heard the number of spools stated that I recollect of.

828 X Q. Your records of agents' orders show the numbers, do they not?

A. Probably they would show the numbers ordered.

829 X Q. In answer to 108 Q. you state that you had several samples made (of labels) by different lithographers to determine which was the plainest and would most distinctly show the name of the company. Was it in 1878 that you did that?

A. We did it at several different times, and I think we did have some made by different ones at that time.

830 X Q. Are you sure you had some made at that time?

A. I couldn't say that we had some made at that time, certainly.

831 X Q. When subsequently did you have any made?

A. I couldn't tell the dates. We had a great deal of trouble with our labels smutting. The black would rub into the gold, and we had several samples submitted from Mr. Lutz and some from other parties to determine which were the best, and we finally decided to let Mr. Lutz make them for us, as we thought his were the best, and I think that was about the time or somewhere near that the change was made from the American to the Merrick label.

832 X Q. Have you succeeded in remedying that difficulty?

603 A. Well, we have made progress in that direction; I shouldn't say that we were exactly perfect.

833 X Q. How long have you continued to have trouble from that cause?

A. We have had some trouble of that kind ever since we began to use the black and gold label.

834 X Q. Does the smutting you speak of tend to obscure the name?

A. It blurs the lettering and the number on the ticket, the smut that I speak of. In spools in transportation there is more or less friction of the ends, and they have a tendency to smut unless they are very perfect, and do then some, the best of them.

835 X Q. Then do you consider that the designs and lettering on all black and gold labels are apt to be indistinct?

A. They are liable to. Old thread that has been handled and moved around for a long time will get more or less indistinct in the lettering upon the label.

836 X Q. Is this indistinctness more frequent and common in the case of black and gold labels than in the case of other colored labels known to you?

A. I should think it was.

837 X Q. How long have you known that fact?

A. I never had it called to my attention before now that I recollect of.

838 X Q. Have you ever had any trouble from smutting in the case of your labels other than black and gold?

A. Our other three-cord thread is put up in papers and is wrapped tight, so that the spools won't have a chance to move in the dozen package as they do in the box; but they get old and indistinct somewhat in time.

839 X Q. Question repeated.

A. I shouldn't apply the word "smut" to the others; I apply that more to something that is black.

840 X Q. Have you had any trouble from your labels getting indistinct other than in the case of the black and gold ones?

604 A. We have had them get chafed some, so that they would not be plain.

841 X Q. Have you ever tried to remedy that?

A. We tried to remedy all of those things.

842 X Q. When?

A. All the time.

843 X Q. Can't you be more specific than that?

A. We have always tried our best and spent considerable money to get labels of all the different kinds which we use as perfect and that would keep their color and brightness just as long as it was possible to have them do so.

Adjourned to October 22d, 1886.

NEW YORK, *Oct.* 22*d*, 1886.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of cross-examination of LYMAN R. HOPKINS:

844 X Q. Are you able to explain to-day what you meant by "root" in your answer to the 788th question any more fully than you did in answer to question 789?

A. Yes, sir.

845 X Q. Please do so.

A. In getting at the twist of the different sizes of yarn I think it is the square root of the number that determines how much twist is to be put into each number; the square root of any number is a quantity which being multiplied by itself will make that number; for instance, the square root of sixteen would be four and the square root of thirty-six would be six. Now, if we put ten turns to the root to the inch in No. 16 it will make forty turns to the

605 inch; if we put ten turns to the root to the inch in No. 36, it will make sixty turns to the inch, and that is what I mean by the same proportion of twist.

846 X Q. Then, do I understand you that if No. 16 thread is given a number of turns equal to its root, which is four multiplied by ten, which gives forty turns, that No. 100 would be given a number of turns equal to its square root, ten multiplied by ten, which makes one hundred turns to the inch, and so with the other numbers?

A. Yes, sir; in the same proportion. That is the way that we twist it. That's our rule, in that proportion.

847 X Q. In your answer to 49th question you say that you think that Messrs. Orrs & Macnaught were the first to advance the making of six-cord thread to as high a number as 80. Have you any personal knowledge on that subject?

A. None except that I have heard, and heard at the time as to its being so, that they made their cord six-cord up to and including No. 80.

(Complainants' counsel moves to strike out answer to question 49 as incompetent because not within the personal knowledge of the witness.)

848 X Q. Do you know to how high a number six-cord thread had been made by any manufacturer prior to 1865?

A. I know it had been made as high as No. 60.

849 X Q. No higher?

A. I couldn't say whether it had been made any higher. I know it had been made up to that. I think it had been made higher.

850 X Q. What manufacturers, to your knowledge, had made six-cord thread as high as No. 60 prior to 1865?

A. I don't think I had examined personally but a very few of them. I know I examined the Orrs & Macnaught's, but I
606 don't recollect that I did any of the others. I might have done so. I don't recollect it now.

851 X Q. What numbers of six-cord thread did the Merrick Thread Company commence with in 1865?

A. I don't think we made any six-cord thread in 1865; we might a very little; not much. I couldn't say.

852 X Q. What numbers did they commence with when they did commence?

A. We commenced on the medium numbers first, or the numbers, I should say, from 8 up to about 80.

853 X Q. Was it the practice of the different manufacturers in the trade in supplying lines of their goods for retail trade to furnish the numbers in three-cord thread which were higher than the numbers in which they made it six-cord?

A. You mean at that time?

854 X Q. I mean before the manufacturers, any of them, made six-cord up to the No. 100.

A. I think some of them did; a three or a four cord—substituted a three or a four cord some of them.

855 X Q. How early did any manufacturers commence to put up 200-yard spool cotton of higher numbers than 100 of any kind?

A. I couldn't say how early. I have seen those numbers in 200 yards as early as 1868, and I might have seen them long before; but I know that sure.

856 X Q. Whose spool cotton did you first see, as far as you recollect, put up in numbers above 100?

A. I saw both the Clark's and the Coats'.

857 X Q. Was it the general practice in supplying lines of thread

for the retail trade for the manufacturers to furnish all the numbers at a uniform price, although the higher numbers, even below 100, were either three-cord or four-cord?

607 A. I think all that was billed as six-cord was charged at a six-cord price; I think that was the practice.

858 X Q. Please answer the question.

A. That with us would depend upon what the man asked for; I can't say exactly what the practice of other companies was.

859 X Q. When you were in the retail business prior to 1865, were you accustomed to keep full lines of thread, high numbers as well as low and medium numbers?

A. I don't think I kept anything finer than 80.

860 X Q. Did you use to purchase No. 80 before it was made six-cord by any manufacturers?

A. I think I bought 80 three-cord thread; we had 80 three-cord thread in the store; the most of the thread that I kept at that time was three-cord thread and the biggest quantity sold by us.

861 X Q. Were you not accustomed to buy thread of the manufacturers who made six-cord, and did they not in supplying you with their lines of goods charge you a uniform price for all the numbers, although some of the upper numbers were made of three or four cord?

A. I did not buy any thread from the manufacturers; I bought it from a jobber in Providence, and I could not say at the time whether there was any three-cord thread in the bills of thread which I bought as six-cord or not.

862 X Q. Don't you know that it has always been a general practice of both manufacturers and jobbers in supplying their full lines of thread, of which the lower numbers only were six-cord, to charge a uniform price for the whole series?

A. I think it has generally been the practice in selling those manufacturers' goods, who put up the numbers finer than 100 in the same general style as the lower numbers, to sell them at the same price.

863 X Q. And wasn't that also true before any manufacturers put up any numbers as high as 100 of six-cord thread?

608 A. I don't think it was so general. When the sewing machine came more into use there was a larger demand for a finer six-cord thread, and I think the most of the manufacturers advanced from 80 to 100. I don't think there had been a demand for thread finer than 80 previous to that, to any extent.

864 X Q. Still, wasn't it the fact that most, if not all, the manufacturers did make thread as high at least as No. 100 and sell all the numbers at a uniform price, irrespective of the fact that the upper numbers were made of three or four cords?

A. Probably they did to a small extent.

865 X Q. They did to all the extent for which there was any demand for the upper numbers, did they not?

A. I suppose they did.

866 X Q. Can you name any manufacturers who did not do so?

A. No.

867 X Q. Do you know Mr. William G. Pierce, of Boston?

A. No.

868 X Q. Do you know the house with which he is connected in Boston?

A. No; I don't know; I don't recollect any one by that name, W. G.; I know a Pierce.

869 X Q. What Mr. Pierce do you know?

A. I can't tell you his initials.

870 X Q. What business relations, if any, had he with the Merrick Thread Co.?

A. The Pierce that I know was of the firm of Rice & Pierce, and they used to buy thread of us.

871 X Q. Did they sell on commission for your company?

A. No.

872 X Q. Do they still buy of your company?

A. I think not; I think the firm has dissolved.

873 X Q. When?

A. I couldn't say, but I think it is quite a number of years, I should say.

609 874 X Q. When you commenced to make your thread with the American Thread Co. label what numbers of such thread did you make—200-yard?

A. My impression is that we made it up to about 80.

875 X Q. Did you make any higher numbers in three-cord?

A. At that time?

876 X Q. At that time.

A. Yes; we made it with the Merrick label in higher numbers at that time.

877 X Q. Did you make any with the American Thread Co. label in high numbers—200 yards?

A. I don't think we did, but I won't say certainly without investigating.

878 X Q. How could you find out?

A. All the way I could find out anything about it would be by inquiring at the mill. We had just commenced to put up six-cord thread on 200 yards and I don't think we put up any higher than No. 80, 200-yard six-cord, when we commenced.

879 X Q. Are there any books from which the fact could be ascertained whether three-cord thread of the higher numbers was sold with the American Thread Co. label on it?

A. I don't think there is; still I couldn't say certain.

880 X Q. Isn't it a fact that after you first commenced your company did sell 200-yards spools in numbers higher than 80 which were really three-cord thread, but which bore the black and gold label of the American Thread Co.?

A. I couldn't say, but I will find out if I can and give it at the next session. I have no recollection of ever seeing a spool having that ticket on three-cord 200-yard thread.

881 X Q. Will you produce at the next session a set of boxes of thread of each number made by your company with black and gold American Thread Co. label, 200 yards?

A. I can't do it, because I don't believe they are in existence. I will come as near to it as I can.

610 882 X Q. Can you give the dates when your company first commenced to make the different numbers of six-cord thread on 200-yard spools?

A. As near as I can recollect we commenced to make six-cord 200-yard thread either the latter part of 1867 or the fore part of 1868. It might have been a little earlier; it might have been a little later.

883 X Q. What numbers did you commence with?

A. I think we made the medium numbers first, which were generally in the most demand.

884 X Q. Up to as high as 60 at first?

A. Well, I think that within not a very long time we made up to as high as 80, but probably not at first.

885 X Q. How early did you commence to make No. 90 in six-cord?

A. I couldn't say, but my opinion is when we changed from 80 we went to No. 100, and my best recollection is that that was about 1872.

886 X Q. How did you make any numbers higher than No. 100 with the American Thread Company label?

A. I don't think we ever put up any higher than No. 100 with that label.

887 X Q. Are you sure?

A. I am pretty sure; I have no recollection of seeing one. That is as far as I can go.

888 X Q. But would you undertake to say that you did not?

A. I will undertake to say that I never saw one, and I don't think that any were ever put up higher than 100 with the American Thread Company label on. The word American is on one of our labels now of our six-cord 200-yard thread.

889 X Q. On your direct examination, in answer to Q. 148, you read a letter, dated August 12th, 1879, addressed to you by the attorneys for Messrs. J. & P. Coats and complaining of the infringement of their trade-mark, and in answer to Q. 149 you read your reply, dated August 19th, 1879, to that letter. Did you con-

611 sult counsel before writing the letter of August 19th upon the subject of the complaint made in the letter of August 12th?

A. I did not, if you mean a lawyer as counsel.

890 X Q. Then your letter of August 19th was one composed by yourself and containing only your own ideas, was it?

A. Yes; I think that was entirely my own; I wrote every word of it myself without any suggestion from anybody. I talked with those in the office and then went out and wrote that letter. I had been down to Providence after I received the letter, the first one, and made inquiries of spool-makers in relation to embossed spool heads and learned some of the facts stated in the letter in that way.

Adjourned to ——.

NEW YORK, *March* 3*d*, 1887.

Met pursuant to adjournment.
Present: Counsel as before.

Continuation of cross-examination of LYMAN R. HOPKINS:

891 X Q. Have you complied with the request made at the time of your previous examination for the production of certain books and papers and giving certain evidence, or are you ready now to comply with the same?

A. I can answer some of the questions which I told you I could find out about.

892 X Q. Please answer what you are willing to.

A. I answer the 368th Q. in my 374th and 375th answers. As my answer to question 398, I say that I cannot ascertain the exact dates when we commenced to make the different numbers of three-cord thread higher than 100. In answer to the 437th question
612 I would say that I cannot find out any more than what I have already testified to in relation to that. In answer to 438th question I would say that our books do not show when we commenced to put up spools higher than No. 100 on 200-yard spools. In answer to 440th question I will say that I have no means of finding out; I say that our superintendent does not keep a memorandum of the winding department. In answer to questions 497 and 498 I will say that I have already answered them as well as I can. In answer to question 519 I would say that I cannot give the exact dates on which those different styles of stamping or embossing was commenced, but I would say that the one which I now point out I think was the earliest of the four now before me, and I mark it in ink with the figure 1 on the head of the spool.

The one I now present came next in order, and I mark it 2. It is already marked also "Complainants' Exhibit Stamped Spool Before 1878."

The one I now present was the next style in order, and I mark it with the figure 3.

The one I now present is the next, and I mark it No. 4, and I think they come in that order.

(Complainants' counsel notes that the styles of spools referred to, marked 1, 3, and 4, were taken from Complainants' Exhibit Box Comparative Samples, and are now separately labeled and marked respectively as follows: No. 1 as Complainants' Exhibit Defendants' First Style Stamped Spool, March 3d, 1887; No. 3 as Complainants' Exhibit First Style Embossed Spool, March 3d, 1887, and No. 4 as Complainants' Exhibit Second Style Defendants' Embossed Spool, March 3d, 1887.)

All I can say about the dates is that we had stamped the number and the name of the company on long-length spools from about 1866, and the four spools referred to come in in the order I have named, but the dates I can't give. In answer to question
613 520 I will say that Merritt Brothers, of Springfield, Massachusetts, made the gnarls for us. As to qustion 553 I don't

think I shall go into an answer to that question. I can't see that it has anything to do with the case whatever. I make the same answer to question 555. All the answer that I can give to question 631 has already been given in the number of spindles that we were running, and the proportion would give an idea of our proportion that we were producing of spool cotton. I think that question 632 is answered by my answer to question 633. Question 656 I decline to answer, the same as I did before. As to questions 659 and 660 I decline to give any other answer. As to questions 699 and 700 I decline to give any other answer than I did. In answer to questions 737 to 752, inclusive, I decline to give any other answer. As to question 778 I decline to give any further answer. As to questions 779 and 800 I decline to give any further answer. As to questions 880 and 881 I say that I could not find out how fine numbers were put up on 200-yards with the American Thread Company label on it. I cannot produce a set of boxes, as they are not in existence. I have already produced one or two boxes, which are already in evidence; that is as near as I can come.

893 X Q. In your answer to the 892d question you say that you "cannot ascertain the exact dates when we commenced to make the different numbers of three-cord thread higher than 100."

Give the earliest dates that you can ascertain from your books at which you find that you were making each number higher than 100.

A. I suppose I could give it approximately here, but not exact; somewhere in the neighborhood; the year. Do you mean 200-yards or any length?

894 X Q. Give the facts as nearly as you can approximate them now as to the 200-yards spools.

A. I should think we put up a very little on 200-yards spools as early as about 1876.

895 X Q. Can't you be any more full or specific than that?

614 A. No, sir.

896 X Q. Have you found the bills of Messrs. Merritt Bros., of Springfield, which was rendered you for making the first dies for the gnarled heads of spools having embossed numbers?

A. I have found an account which will enable me to give the date of the first change.

897 X Q. Please produce that account.

A. I can give you the date of the first charge Merritt has against us for making gnarls.

898 X Q. In answer to the 896th question you said you had found an "account," and I notice that you are referring to a paper that you hold in your hand; will you let me see that paper?

A. Well, I have no objections to your seeing it if you want to. (Hands paper to Mr. Betts).

899 X Q. Will you please read the paper to the examiner and explain what it means?

A. The paper reads as follows:

M
(monogram.)

"OFFICE OF THE MERRICK THREAD CO.,
HOLYOKE, MASS., *Oct.* 9, 1886.

"Mr. H. F. Palmer.

"DEAR SIR: Merritt Bros.' first bill to us of knarls was dated "June 27th, 1879, and read as follows, among other things, viz:

"Jan. 27—2 knarls, experimental		No. 10 a	
"Mar. 10—4 "	"	Nos. 8, 16, 30, 40	
"April 2—1 "	"	No. 24	
"April 16—3 "	"		
Total 10			$10 00
"May 29—5 knarls, Nos.	24, 30, 36, 40, 80 @ $2		10 00
"May 14—3 "	" 50, 60, 70 @ $2		6 00
"June 17—1 "	" 90		2 00
"June 27—1 "	" 20		2 00

Resp'y, O. H. MERRICK.

615 I told Mr. Betts, in answer to question 521 of this cross-examination, that I would endeavor to ascertain who made the gnarls by writing to the mill. This paper is in answer to Mr. Palmer's letter, who wrote for me, and the paper explains itself.

900 X Q. What were the experimental gnarls charged on the Merritt Bros. account between January 27th and April 16th, 1879?

A. Iron or steel gnarls for embossing on the wooden end of a spool.

901 X Q. Why are they called "experimental" in the account?

A. I cannot tell you any more than they were probably the first ones they tried to make for us.

902 X Q. Do you understand that the numbers given opposite the different gnarls in the account, such as "No. 10" and "Nos. 8, 16, 30, 40," indicate the numbers or figures which were to be embossed on the spool heads by means of such gnarls?

A. I think they were.

903 X Q. You are aware, are you not, that the complaint in this case alleges that the sale of your spools having the numbers embossed around the periphery of the spool head on the wood of the spool and having a black and gold label are calculated to mislead purchasers into supposing that your spools are Coats' spools?

A. I am aware that they have alleged that in their complaint.

904 X Q. You have personally attended to most, if not all, of the sessions at which the witnesses for the complainant were examined, have you not?

A. Not all of them. I have attended quite a long proportion of them, I should think.

905 X Q. You are aware, are you not, that at those sessions a number of dealers in spool cotton have testified that your
616 company's spools and labels bear such a resemblance to those of Coats' as to be likely to deceive customers?

(Objected to as a question for the court to determine and not for the witness, and for the further reason that the testimony itself is the best evidence of what was sworn to and what the general effect of it is.)

A. I recollect there was some testimony to that effect, but I can't remember the particulars.

906 X Q. And do you also remember that some such witnesses testified that they knew of some instances in which the mistake had been made?

(Same objections.)

A. I don't remember it exactly in that way as you state it.

907 X Q. How do you remember it?

(Same objections.)

A. As near as I can remember, there was one witness who said he had innocently rolled up or put up a spool of our thread thinking it was Coats'—that is, as near as I can remember.

908 X Q. This suit has been going on for some years, has it not?

A. Yes, sir.

909 X Q. Has your company desisted from putting up their thread and marking their spools in the manner complained of since you learned that it was a cause of complaint and mistakes had been made on that account or were likely to be made in the opinion of the dealers who were examined?

A. We never have made any change since 1879.

910 X Q. In your direct examination you spoke of some of your spools having embossed upon their heads a star between the numerals. Do you think that the embossing of that star gives to your spools a distinctive appearance which distinguishes them or enables them to be recognized from other spools?

617 A. I think that those stars in connection with the star in the center, which has always been on our six-cord thread, 200 yards, helped some to designate it as our thread.

911 X Q. Do you think that the use of the embossed stars alone and without the star on the paper label would give your spools a distinctive appearance or enable them to be recognized from other spools?

A. I don't think the star alone without the name and the star in the center would be a sufficient mark so that people would think it was our thread.

912 X Q. Did anybody prior to your company, ever to your knowledge, emboss a star or series of stars around the periphery of the spool head, upon the wooden spool?

A. Well, sir, I couldn't say; there has been so many patterns of embossing; I have no recollection of seeing a periphery of stars previous to our putting them on; the designs have been numerous of all kinds of shapes and patterns, and some of them might have included a star; I couldn't say.

913 X Q. Do I understand you to mean that if a manufacturer should emboss his spool heads with a series of stars around the

periphery and on the natural wood of the spool, and should also use on his spool heads a black and gold label similar to yours, except that it had his own name upon it and not yours and no star on the paper label, that you would not regard such action on the part of a manufacturer as calculated to deceive customers or injure you in any way?

A. I think if he had his own name plain and distinct upon the label, that being what the threads are known by in the market, that the simple putting on of the stars on the periphery, the people would not be liable to be deceived in the make of the thread, and I don't think that I should consider that anybody would be deceived.

914 X Q. How, in case the name of the manufacturer on the label was not "plain and distinct" or became blurred by shop wear of the spool, would the embossed stars then be likely to deceive?

618 A. If the name had become defaced so that it couldn't be seen no one could tell who the maker was; there has been so many patterns of embossment, I don't think any one would know which one to attribute the spool to at all, if there was no name on it.

915 X Q. If one manufacturer had adopted and used for a series of years one particular pattern of embossment on his spool heads so that his spools had become recognized as the only ones which had that pattern, do you think that it would be fair for another manufacturer to adopt and imitate that pattern?

A. I think if a man adopts a symbol or particular pattern and his goods become known by that symbol and that pattern, I don't think it would be right for another man to make one like it, just in the same way that I would say his name.

916 X Q. Do you think, under the circumstances mentioned in the last question, that it would be fair and honest dealing to adopt and imitate the pattern of the manufacturer first spoken of, even though the party who imitated his pattern did put on his own name?

Former question re-read.
(Objected to as indefinite and immaterial.)

A. I don't think it is right for any manufacturer to put anything on his goods to try to sell them for another's; if he makes difference enough in his labels and marks so that the people can understand them, I don't think that he is infringing on the rights of any others.

917 X Q. Cannot you answer the last question specifically? Please hear it read again in connection with the preceding one and answer it as specifically and definitely as possible.

(Same objections.)
Said questions read to witness.

619 A. Not if the parties' goods were known exclusively by that embossment.

918 X Q. How would it be if they were partially or to some ex-

tent recognized by that embossment, would your opinion be any different?

(Same objections.)

A. That would depend entirely upon how much they were known by. If that was what they asked for in the market, a spool embossed by a particular pattern, then I should think it would be wrong for any one to do it in that way.

919 X Q. Do I understand you to mean that you think that if the first manufacturer's goods were only recognized to a small or limited extent by the embossment that then the man who imitated it would be acting honestly, but if they were known to a considerable extent by reason of the embossment that then the imitator would be unfair and dishonest?

(Same objections.)

A. I mean to say that if a person bought a spool by the embossment of a particular pattern and it was known in the market by that pattern, I don't think it would be right for another to make it so near that people would be deceived; that is as near as I can get to it, and I will say right here, there has been so many patterns of embossed spool heads that, in my mind, they don't give any particular idea of who the manufacturers are.

920 X Q. I am assuming a case of a manufacturer who adopts, before any one else, a particular pattern for embossing his spool heads, and I ask you whether, if the spools of such a manufacturer should become known to the public and come to be recognized to any extent (greater or less) by that embossment—whether you would consider it fair and honest for another manufacturer who knew those facts to imitate the first manufacturer's embossed pattern, even though the imitator put on his own name?

(Same objections.)

620 A. I don't consider that it would be right for one man to imitate another so that his goods would be bought for those of the other. That is as far as I can go.

921 X Q. Cannot you be any more specific than your last answer?

A. No, sir.

Recess.

Resumed after recess.

922 X Q. Is there any advantage to a manufacturer of spool cotton in making the spools due to the fact that numerals are embossed on the heads of the spools so as to be raised up from the surface, as distinguished from stamping such numerals on the wood of the spools so that the figures are depressed?

A. I think they would be more readily seen to be raised.

923 X Q. You think the embossing therefore is an advantage?

A. I think I should prefer it.

924 X Q. Is it any advantage to the manufacturer of the spools or would you consider it an advantage to the users only?

A. Well, I consider what would be an advantage to the user would be an advantage to the manufacturer, because what the user would rather have would make it advantageous to the manufacturer to make.

925 X Q. Why so?

A. Because if it was an advantage to the user he would buy these goods which were an advantage to him. He would be most likely to.

926 X Q. Do you give your last answer as the result of your practical experience in the spool-cotton business?

A. Not particularly. Simply a matter of judgment.

621 927 X Q. Is it your judgment, then, that the use of embossed numerals on the periphery of your spools has promoted the sale of your spool cotton?

A. I couldn't say particularly that it has or has not. It is the only way since 1879 that we have put numerals on 200-yard spools.

928 X Q. When you determined to adopt the use of embossed numerals on your spool heads did you do so with any thought or expectation that it would promote the sale of your spool cotton?

A. We talked the matter over and we thought it would be a good idea to preserve the number of the thread on the spool after the ticket had become defaced, lost off, or from any cause become indistinct, and that was the reason why we adopted the idea of putting the number on the wood of the spool. We thought that that would be an advantage.

929 X Q. Do you mean that that is the way that you talked the matter over in 1878, or just before you adopted the embossed numerals?

A. I think the time we talked the matter over was just before we wrote Mr. Conant in relation to getting the die made.

930 X Q. Do you refer to the letter you wrote to Mr. Conant, dated May 11th, 1878, referred to in your answer to the 138th direct question?

A. Yes, sir; that is the letter.

931 X Q. You had for a number of years before that "stamped" the numerals of the thread on your spool heads, had you not?

A. We had on long lengths.

932 X Q. And also on 200-yard spools, like Defendants' Exhibit No. 28?

A. Yes; we made some for Wilcox & Gibbs like that, and I think we stamped the number on some other two hundred yards with a hand stamp, but not very many.

932*a* X Q. Was it your idea and expectation in 1878, when you talked over the matter of "embossing" the number as distinguished from "stamping," that the use of such embossed numerals

622 instead of stamped numerals would promote the sale of your spool cotton?

A. We thought that the embossed numeral was a better way to put the number on the periphery of the spool than a sunken number. We called our mechanic in and he said he could make a machine that would put them in that way—that is, emboss them—

whereas we had previously done it by hand mostly on the large spools of stamping.

933 X Q. Please answer the last question.

(Question re-read.)

A. I can't answer that any further than that we thought it would be better; would be seen better; be more marketable and you could see the number plainer.

934 X Q. Did you have any other reason for wishing to emboss the numbers instead of stamping them except that it would make the spools more marketable?

A. We had no particular reason except that we thought it was a better way. We had never seen any 200 yards, the figures of which were sunk in the wood, except what few we had done by a hand stamp.

935 X Q. Question repeated.

A. None, except that we thought it was better and, being better, it would be more desirable; that is all.

936 X Q. By "better" do you mean more marketable?

A. I think the article that is the best is the most marketable. I think, of course, that way.

937 X Q. Won't you please answer the question specifically whether you had any reason for adopting the embossed numerals instead of stamped numerals except your belief that it would make the spools more marketable?

A. As I said before, the conversation with Mr. Page, our mechanic, might have drawn our minds a little towards it, as he said
623 he thought he could make a machine that would do the work automatically in that way, and we thought it would be a better, plainer, and easy-observed figure. Those are the only reasons that I can think of. Being better, plainer, of course we consider would be an advantage in itself.

938 X Q. You seem very loth to say whether or not the marketability of the spools on account of the use of the embossed figures was your controlling reason. Won't you please do so specifically?

A. I have answered just as it is. I can't answer any other way. I say we considered that our embossed figure was a better way and more distinct than the sunken figure, and in that we thought our goods would be more salable to be done in that way than in that which was not so good.

939 X Q. Have you now stated in your last answer the reason which determined your adoption of the embossed figures?

A. Our first idea was to preserve the number; that was one reason. The reason we put it on raised was because we thought it was a better way; then we thought, it being better, it would help the sale of our goods in the market.

940 X Q. You speak of the embossed figures as being "more distinct" than sunken figures. Do you think that these embossed figures were sufficiently distinct to attract intending purchasers of spool cotton and lead them to purchase such spools in preference to others?

A. I think that a lady would prefer a spool with the number on the wood, and if she wanted a particular number she could see it quicker, being in three or four places on the wood, than if it was only on the ticket in one place.

941 X Q. Question repeated.

A. I think I have answered that question.

942 X Q. Do you decline to give any other answer?

A. Read the question and answer.

(Examiner does so.)

624 Witness continues:

My idea is that people wanting a particular make of spool cotton ask for it by the name, and if they could find one that had the number on the wood of the name they wanted I think they would prefer to have it. I think it would help the sale of it.

943 X Q. Question 940 repeated. Please answer this question yes or no. You seem to be very nervous about the answer.

A. I can't answer yes or no in the way you ask that question and give a plain answer unless I am allowed to explain it.

944 X Q. Why are you afraid to answer the question either yes or no?

A. Because you have asked it in such a peculiar way.

945 X Q. What is the peculiarity that you are afraid of?

A. I am not afraid of any of it.

946 X Q. Then please answer it either yes or no, and afterwards add any explanation you wish.

(Question 940 re-read.)

A. If you mean that these being better by being raised, then I answer yes.

947 X Q. You knew that Messrs. J. & P. Coats were using the embossed figures on their spool heads before you adopted them, did you not?

A. Yes, sir.

948 X Q. You knew that they had used such embossed figures for a number of years, did you not?

A. I never had seen them many years before. My recollection is that my attention—noticed them about two years, probably, before that, the first I recollect; it might be three.

949 X Q. You did not know of any other manufacturer of spool cotton who used embossed numerals on their spool heads, did you?

A. I had seen spools with a numeral embossed previous to that, but the numeral was in one place, and I only saw a very few of them.

625 950 X Q. You have not seen fit to mention that fact in your direct examination. How is it that this now comes to your mind?

A. I think there is something of that kind in my direct examination somewhere, either in the letter I wrote to Mr. Varnum, which is in my direct; I think so.

950*a* X Q. Won't you tell us now what these spools were which you now say that you saw?

A. There were some spools that were sent to us from a manufacturer of spools in Providence, Rhode Island. He said he had a new process of making spools with embossed heads and soliciting an order from us.

951 X Q. Did you tell that fact to Mr. Witter?

A. I think I did.

952 X Q. Before you gave your direct examination?

A. I think so.

953 X Q. When was it that you think you saw these few spools?

A. A long time ago. My idea is that it was in 1868 or 1869; a good while ago. I could not say certain.

954 X Q. Can you give us the name of the manufacturer?

A. No, sir; I could not do it.

955 X Q. He was not a manufacturer or a dealer in spool cotton?

A. No, sir.

956 X Q. Then Messrs. J. & P. Coats were the only spool-cotton makers who, to your knowledge, had put up their thread on spools having a pattern of embossed numerals around the periphery?

A. Yes, sir.

957 X Q. Has anybody but your company imitated that practice to the present time?

(Objected to as involving a question of law by using the word "imitated" and as assuming that the Merrick Company has "imitated that practice.")

626 A. Not that I know of, and I don't think we have, as I understand it.

958 X Q. You don't think, then, that your spools have a pattern of embossed numerals around the periphery of the head?

A. We have the numerals with a star around the head, if you call that a pattern.

959 X Q. Do you think that you could read the maker's name on a spool-head label if the spool was distant three feet from your eye?

A. It would depend entirely upon how large a label it was, how large the letters were.

960 X Q. Well, take the case of your own spools No. 8, three feet from your eye.

A. I never tried the experiment. I can't say whether I could or not. My eyesight is not very good. I have to wear specs.

961 X Q. Do you think you could do so with your "specs" on?

A. I wouldn't like to say. If you will place the spool I will try it, and as soon as I can read I will tell you so.

962 X Q. Will you undertake to say that you could read such name at a distance of two feet from your eye with your "specs" on?

A. I think I could read it better with my specs off two feet away. I rather think I could read No. 8.

963 X Q. Do you think you could pick out or distinguish a spool of your manufacture from others of other manufacturers if they

were placed at a distance from your eye further than you could read the name?

A. Yes, sir; I think I could—that is, if they were set up endways I think I could.

964 X Q. Do you think you could if the label ends were towards you?

A. I couldn't say whether I could or not. I couldn't tell much about it. It is something I never tried. If I couldn't see the name I don't think there is anything else I could see to determine whose make it was. The name was the plainest thing on
627 the spool, black. The star in the center is plain. I don't know whether I could see it or not.

Cross-examination closed without waiving the right to move to compel witness to answer questions and produce the books and papers which he has refused.

Adjourned till Saturday, the 5th inst., at 11 a. m.

NEW YORK, *March* 10, 1887—2 p. m.

Met pursuant to adjournment.

Present: C. Wyllis Betts, Esq., for complainants, and W. C. Witter, Esq., for defendants.

Redirect examination of LYMAN R. HOPKINS:

The witness desires to state as follows: "I either was misunderstood or my answer to question 15 was taken down wrong; what I meant to say was John Clark, Jr., & Co. instead of J. J. Clark & Co."

965 R. D. Q. Does your company use a star between the numerals on all its 200-yard six-cord thread?

A. Yes.

966 R. D. Q. For how long has it done so on all such thread?

A. Since some time in the year 1879.

967 R. D. Q. In answer to question 118 you state why you used the star between the numerals on such thread, and you have said that for a brief period you put the numerals upon such thread without the star. Please look at the Complainants' Exhibit Defendants' 200-yard Spool Head, Schedule G, and state whether the spool head with the figure 30 upon it is a sample of the spool head used
628 by you previous to the time in 1879 when you began to put the star between the numerals.

(Objected to as leading.)

A. It is.

968 R. D. Q. And Nos. 36, 40, 50, 60, and 70 are samples of your mode of using the star between the numerals as used by your company upon your 200-yard six-cord thread since the change referred to in 1879. Is that correct?

(Same objection.)

A. Yes, sir.

969 R. D. Q. Now, look at Complainants' Exhibit 200-yard Spool

Heads and Complainants' Exhibit Comparative Samples, at Defendants' Exhibit No. 48, Chronological Exhibit of Thread Manufacture, and state which of the numbers of Coats 200-yard six-cord thread has anything resembling a star upon them.

A. In the first exhibit named in the question I find that No. 8, 16, and 20 is the only ones that have any resemblance of a star that I can see. In the second exhibit mentioned in the question I find the Nos. 8, 10, 12, 16, 20, and 24 only have anything resembling a star on them. In the third exhibit I find the Nos. 8, 10, 12, 16, 20, and 24 only have anything resembling a star on them.

970 R. D. Q. Which numbers of the 200-yard six-cord thread are made and sold in the greatest quantities in this country?

(Objected to as incompetent.)

A. No. 50 would come first; next I should say 40 and 60; next 36 and 70, and the next 30 and 80. The rest of the numbers would be a great deal less in proportion than the 40, 50, and 60.

971 R. D. Q. What proportion of the sales of 200-yard six-cord thread in this country do Nos. 8 to 24, inclusive, bear to Nos. 30 to 100, inclusive; in other words, what proportion do the sales
629 of the numbers that are stamped by the Coats people with anything resembling a star bear to the numbers that are not?

(Same objection.)

A. I should say about one-eighth.

972 R. D. Q. Do you mean that Nos. 8 to 24 would be fairly represented by one-eighth and Nos. 30 to 100 by seven-eighths?

(Same objection.)

A. Yes, sir.

973 R. D. Q. And in these estimates do you include all the principal makers, the defendants among the number, to wit, John Clark, Jr., & Co., Clark Thread Company, Coats, Merrick, Willimantic, and Kerr?

A. Yes, sir; I include them all.

974 R. D. Q. Under the circumstances, do you consider that a star or anything resembling a star forms any part of a trade-mark used by the Coats people or any part of an embossed or stamped design which could ever come to be recognized as designating Coats' 200-yard six-cord thread?

(Objected to as incompetent.)

A. I think it does not.

975 R. D. Q. Assuming that the periphery portion of the Coats alleged trade-mark sued upon consists of numerals in connection with crossed lines or their equivalent, state whether your company has ever used upon its 200-yard six-cord thread any design which included crossed lines or their equivalent.

(Same objection.)

A. We have never put anything on our 200-yard six-cord thread

except the numeral and the star, no crossed lines, and nothing in place of the crossed lines.

976 R. D. Q. Do you consider that your company since
630 the year 1877 has had a perfect right to emboss the numeral upon the periphery of its spool heads, whether with or without the crossed lines?

(Objected to as immaterial and incompetent—immaterial as to the opinion and incompetent as to the matter.)

A. I think we have had a perfect right. There certainly could be no question as to our right after the expiration of the Conant patent.

977 R. D. Q. State whether the central star upon your label aids in enabling the public to distinguish you manufacture.

(Objected — as incompetent.)

A. I think it does.

978 R. D. Q. Was it put there for that purpose?

(Objected to as leading.)

A. Yes, sir; we have used it ever since we commenced to make six-cord thread, and still continue to do so.

979 R. D. Q. Am I correct in understanding you to say in your testimony that it is the name upon the label that designates the maker of the thread quite exclusively (and only excepting to some extent the two Clarks, whose last names are alike), and that your star, your different arrangement of the number and quality of the thread, the star upon the paper label, and the different size and shape of spool are added means of distinguishing your thread from others?

(Objected to as leading and as incompetent.)

A. I think the name is the main thing, and the other peculiarities mentioned, all of them, help still more to designate our thread from any of the other manufacturers.

980 R. D. Q. Is it because spool threads are known and distinguished by the name of the maker that you have given your
631 name the prominence which you have upon the label and that you have placed it on the accustomed place upon the label?

(Same objection.)

A. Yes, sir; we wished the public to understand that we were the makers of that thread, the Merrick Thread Company.

981 R. D. Q. Does your name occupy upon your label a larger space than anything else upon it and a larger space than is occupied by the name of any other maker upon its label except, perhaps, the Willimantic and, possibly, the Hadley Company?

(Same objection.)

A. I should think it did.

982 R. D. Q. Now, if upon your spool the name could not be seen

upon the label, but the stars appeared upon the periphery and the central star were used upon the label, which would the thread be most likely to be taken for, yours or any other manufacturer?

(Objected to as incompetent.)

A. I should think it would be more liable to be taken for ours, because it would still have some of the characteristics of our spools; the spool would be longer and it would have the star on the center, and the stars on the periphery would help, to some extent, to show it was ours.

983 R. D. Q. Have you ever known the name on your black and gold ticket to become so blurred or indistinct before the goods reached the consumer as that the name was difficult to make out or likely to be taken for any other name?

A. Never since we made the change in 1879 from the American to the Merrick Thread Company.

984 R. D. Q. And has your effort been to so impress the name upon the ticket that it should not be defaced?

A. Yes, sir; and we have spent considerable money to that end.

632 985 R. D. Q. State whether the Conant patent embodies useful features and what they are.

(Objected to as incompetent.)

A. I think it does. I think that putting the numeral on the periphery of the wood of the spool in different places is useful, because it preserves the number designating the size of thread on that spool when the ticket is either lost off or defaced or becomes indistinct from any cause whatever.

986 R. D. Q. What is the utility of having the number in more than one place?

A. Because it can be seen in any position in which the spool is held.

987 R. D. Q. What is the utility, if any, of stamping a raised numeral over stamping a depressed numeral—that is, in cameo instead of in intaglio?

(Objected to as incompetent.)

A. I think it can be more readily seen and makes a better, nicer finish, a better-looking spool.

988 R. D. Q. Certain questions were put you by complainants' counsel, calling for your opinion upon certain supposed cases, being questions 911 and 914 to 921, inclusive. Please state whether these questions are applicable to this case.

(Objected to as incompetent.)

A. I don't think they are. I think that after the expiration of the Conant patent we had a perfect right to put the numerals on the periphery in any shape or manner.

989 R. D. Q. Has your company ever embossed its spools with the embossed features of the alleged trade-mark of Complainants'

Exhibit 200-Yd. Spool Heads in Exhibit Comparative Samples and in Defendants' Exhibit No. 48?

(Same objection.)

A. I don't think we have. We have never used the crossed lines or anything in place of the crossed lines, nothing but the star and the numerals.

633 990 R. D. Q. So that you have used only the useful descriptive numerals in the useful manner, to wit, putting it in more than one place and in raised characters as perhaps more useful than depressed characters, and combined therewith your own star. Is that so?

(Objected to as leading and incompetent.)

A. Yes, sir; that is so.

991 R. D. Q. Please look at the Conant design patent and the embossment upon the Coats spool heads in evidence in the three exhibits referred to and state whether they are not in fact not merely substantially but almost exactly the same.

(Same objection.)

A. I should say they were.

992 R. D. Q. Referring to your answer to 922 and 923 X questions, do you mean to be understood as saying that the word "stamping" does not properly define the act of raising letters or numerals?

(Objected to as leading and incompetent.)

A. I understand that the word "stamp" may be used interchangeably, either meaning a raised figure or a sunken figure, and to illustrate my meaning I would say we speak of a stamped coin, which has both raised letters and figures, and we also speak of a stamped maker's name on iron tools, which are sunken letters.

(Answer objected to, as the witness has not shown his competency to give definitions of words.)

993 R. D. Q. Do you find your opinion supported by authority; and, if you do, may we consider the definitions of that word in Webster, Worcester, and in Knight's Mechanical Dictionary as a part of your answer to this question in support of your view?

(Objected to as incompetent.)

634 A. I do find them so, and you may consider them as a part of my answer.

994 R. D. Q. You have stated in your testimony that you used the star on the periphery of your spools for the following reasons: because a star had been one of your designating marks for many years, because you were thus enabled to prevent from slipping the stamp or instrument by which the numeral was impressed, and for beauty; how many years have you used a star as one of your designating marks?

A. Since 1869, when we commenced to make six-cord thread on 200-yd. spools.

995 R. D. Q. Is there any advantage that you know of, to a manufacturer and seller of spool cotton, due to the fact that numerals are embossed on the heads of the spools so as to be raised up from the surface, as distinguished from stamping such numerals on the wood of the spools so that the figures are raised (if in fact there be any such distinction)?

A. There is no difference if they are both raised figures.

996 R. D. Q. Do you think there is any advantage to the consumer of stamping raised numerals on spools as in coining metals, or, in other words, embossing numerals on spools over and above stamping depressed numerals, except that by means of the raised numerals the size of the thread could perhaps be a little more readily observed?

(Objected to as already answered.)

A. That is all the difference, seeing it plainer, a little plainer.

997 R. D. Q. Previous to your putting raised numerals on your spools in 1879, had your stamping of spools been to produce raised letters or depressed letters?

A. We had used depressed letters on our long-length spools and continue to do so now.

998 R. D. Q. Such use as you had made of numerals in the wood prior to 1879 had been depressed then, had they?

635 A. Yes, sir.

999 R. D. Q. Was the proposed machine spoken of by you in answer to cross-questions 932 and 937 to be a machine for raising letters by a stamp?

A. Yes, sir.

1000 R. D. Q. Can you and will you produce one of the spools referred to in your answer to cross-question 949?

A. Yes, sir, I can, and I produce the spool.

1001 R. D. Q. Have you recalled where you got such spools, so marked? If so, state.

A. They were sent to us by Rider & Brownell, soliciting an order.

1002 R. D. Q. Whence?

A. Providence, R. I.

1003 R. D. Q. When?

(Objected to as not the best evidence.)

A. It was some time before 1870; about the time when we commenced to make six-cord thread on 200-yard spools; about that time. It might have been somewhat before that; not very long.

1004 R. D. Q. Is the spool you have produced one of the spools sent you at that time?

A. Yes, sir.

(Defendants' counsel puts the said spool in evidence and it is marked "Defendants' Exhibit No. 55 Spool with Raised Letters and Numerals.")

(Objected to as immaterial.)

1005 R. D. Q. You have stated that the reason for using the wooden numerals is in order that the size of the thread may be preserved upon the article. Is that reason expressed in the Conant patent?

A. Yes, sir; it is.

1006 R. D. Q. You have stated that the reason for using these wooden numbers more than once is that the number may be more readily observed—observed without turning the spool. Is that feature of utility shown in the Conant patent?

636 A. Yes, sir.

1007 R. D. Q. Is the Conant patent limited to stamping the spools with depressed numerals, as you understand it?

(Objected to as incompetent.)

A. No, sir; the drawings of the design are all represented in the same way and the description of it uses both the word "emboss" and "stamp."

1008 R. D. Q. And, if I understand you, stamped means embossed if the numerals stamped are raised. Is that so?

(Same objection.)

A. Yes, sir; I so understand it.

1009 R. D. Q. Is the claim of the Conant patent entirely general on this subject, as you understand it?

(Same objection.)

A. Yes, sir; I so understand it.

1010 R. D. Q. Do you think the Conant patent would have been infringed by one who stamped a depressed looping and raised numerals in the loops?

(Same objection.)

A. Yes, sir.

1011 R. D. Q. Do you think it would make any difference upon this question of infringement how the loops and numerals were produced, whether by hand stamp or machine stamp or by a gnarl or a punch or a die and whether raised or depressed?

(Same objection.)

A. No, sir; I don't think it would make any difference.

1012 R. D. Q. Would the utilities and the beauty of the ornamentation be the same in kind however produced, though the raised form may have such preference as you have referred to in your testimony?

(Objected to as leading and as the witness has already fully answered it.)

637 A. They would; yes.

1013 R. D. Q. State whether it has been your constant endeavor to distinguish your thread, not merely from Coats, but from that of any foreign manufacturer.

(Objected to as leading.)

A. It has.

1014 R. D. Q. How?

A. By putting our own name upon it; also the word American. We have made the thread longer and have used a star in the center; but the word "American" more especially designates it from any foreign manufacturer.

1015 R. D. Q. When have you used the word American and for how long?

A. We have used the word American ever since we commenced to make six-cord thread on the spools; from 1869 to 1879 it was on the black and gold label, and when we changed that label to the Merrick Thread Company the word American was still preserved on the other end of the spool. The word American was also used on the boxes, on the wrappers of ten dozen packages, and has been used in connection with our trade-mark, in connection with all of our packages, signs, etc.

Adjourned to 1.30 p. m., March 10, 1887.

NEW YORK, *March 11th*, 1887.

Met pursuant to adjournment.

Present: C. Wyllis Betts, for complainants; W. C. Witter, Esq., for defendants.

Continuation of the examination of the witness, L. R. HOPKINS:

1016 R. D. Q. Just before the adjournment yesterday you were mentioning how your thread has been distinguished from all
638 foreign threads by means of marks having that object. Please continue to mention other marks by which your threads are known to be an American manufacture.

A. We used the American eagle holding a spool of our thread in its talons on all of our 200-yard six-cord dozen boxes, on signs, show-cards, and advertising matter.

1017 R. D. Q. State whether the word American, the eagle, and the stars, wherever any of them appear upon your goods, have been used because they are descriptive and emblems of this Government, and thus to distinguish your goods from any foreign article.

A. They have.

1018 R. D. Q. Question 104 and answer read as follows:

"104 Q. State for about how long you have known of six-cord thread on 200 yards spools being known in this country by the name of the maker.

"A. Twenty years and perhaps longer, some of them."

I understood you to say thirty instead of twenty. Please state the fact, and whether you think you said thirty in answer to that question.

A. Upwards of thirty years. I think I said thirty in answer to that question. I meant to.

1019 R. D. Q. Questions 69 to 71 and answers read as follows:

"69 Q. When you became an officer of the Merrick Thread Company, in 1865, by what sort of label was the best quality of 200-yard thread designated in the market? Describe the label.

"A. I should say by a black and gold label, with concentric rings, the name of the maker appearing on the outside ring; it had figures on it designating the number of the thread and reading de-
639 scribing the quality of the thread as best six-cord, superior six-cord, and sometimes six-cord.

"70 Q. State whether these labels, in addition to what you have stated, sometimes bore characters describing the length of the thread.

"A. They did.

"71 Q. How universal was this practice in 1865 of using a black and gold label of concentric rings with the information above referred to upon it upon one end of the spool of the best quality of 200-yard thread?

"A. It was so on all these makers of 200-yard spool thread, six-cord, that I had seen up to that time, and included J. & J. Clark & Co., Orrs & Macnaught, Coats, Willimantic, and George Clark, and I was also acquainted with John Clark, Jr., & Co.'s black and gold label, which also included a silver line with the black and gold."

State whether the practice therein described has been universal or almost universal from at least 1865 to the present time.

A. It has.

1020 R. D. Q. You have declined to answer several questions upon the cross-examination. State generally your main reason for so doing.

A. I don't wish to disclose what we consider secrets of our business, and those questions called for details of our business which we keep secret to a great extent.

1021 R. D. Q. Have complainants' witnesses declined to answer similar questions?

A. They have.

1022 R. D. Q. It appears in evidence that the defendants have caused a case of 100 dozen of 200-yard six-cord assorted Coats' thread to be bought of complainants. Was that such a case of assorted thread as complainants are regularly in the habit of selling?

(Objected to as incompetent.)

640 A. Yes, sir; I think it is.

1023 R. D. Q. What proportion of it is of numbers higher than 100?

A. Ten per cent.

1024 R. D. Q. What were the yarns or threads referred to by you in answer to question 267 used for?

A. Used on sewing machines for making grain bags.

1025 R. D. Q. What was the cloth referred to by you in answer to question 269 made from?

A. It was made from cotton yarn.

1026 R. D. Q. Question 287 and answer read as follows:

"Do you remember what kind of spool-cotton thread you dealt in in your store at Noosneck; and, if so, what?

"A. Yes; I remember dealing in Coats', Clark's, and Orrs & Macnaught's."

What Clark or Clarks did you refer to?

A. I think we had some of both—the J. & J. Clark and the John Clark, Jr., & Co.

1027 R. D. Q. By J. & J. Clark do you mean thread put up and labeled as shown in the Defendants' Exhibit No. 22, J. & J. Clark No. 50 Thread?

(Objected to as leading and incompetent.)

A. Yes, sir; I think that was the kind.

1028 R. D. Q. Have the Coats people, complainants, so far as you know or have heard, either advertised or in any other way made known to the public prior to this litigation that they claimed the alleged trade-mark of this litigation as their six-cord 200-yard trade-mark or as their trade-mark for any purpose?

(Objected to as incompetent because the witness is incompetent.)

A. Not to my knowledge.

641 1029 R. D. Q. What have you understood to be their six-cord trade-mark as claimed by them:

(Same objection and as calling for hearsay evidence.)

A. Their emblem of the lion and the eagle, which is on all of their boxes of 200-yard thread, and their name, and on the flap on the inside of the boxes up to and including 100.

1030 R. D. Q. Please produce that I may put in evidence a sample of the emblem you refer to.

(Objected to as immaterial and incompetent.)

A. I produce one as it appears on the flap inside the boxes.

(Defendants' counsel offers the same in evidence, and it is marked "Defendants' Exhibit No. 56, J. & P. Coats' Six-Cord Trade-Mark.")

(Same objection.)

1031 R. D. Q. When you say in your testimony that you have done your best towards keeping up with the demands of the trade what do you mean by that?

A. I mean that we have made our goods of the best quality we possibly could make them. We have made the kinds that were demanded by the market and taken all the pains we could to find out what the public wanted in the way of six-cord thread—that is, in numbers and quality.

1032 R. D. Q. Why didn't you make the numbers above 100 six-cord earlier?

A. Because our facilities had not progressed to that point, and it is a very difficult point to make the fine numbers of six-cord thread.

1033 R. D. Q. What was your principal reason for making thsee numbers above 100 six-cord when you commenced?

642 A. We found there was a demand for it, and we wanted to be ahead of our competitors in the same business; we thought it would be a good advertisement for us.

1034 R. D. Q. Is it becoming known that you are making those numbers six-cord and that others do not?

(Objected to as incompetent.)

A. Yes, sir; I think it is.

1035 R. D. Q. State whether, in your opinion, the prevailing belief that Coats' thread in the numbers above 100 is six-cord has had an advantageous effect upon the sale of their 200-yard six-cord thread in numbers below 100.

(Same objection.)

A. I think it has.

1036 R. D. Q. When it becomes more generally known that yours is six-cord and theirs is in fact three, do you expect to reap that advantage yourselves?

A. Yes, sir.

1037 R. D. Q. What is your thread called Carlisle thread?

A. It is three-cord thread, made largely for manufacturing purposes.

1038 R. D. Q. What is your thread which is called Crowley?

A. That is the imperfect thread which is thrown out from both six-cord and three-cord.

1039 R. D. Q. And known as seconds?

A. Yes, sir.

1040 R. D. Q. And sold at a lower price than six-cord price?

A. Yes, sir.

1041 R. D. Q. Do other companies make and sell seconds in a similar way?

(Objected to as incompetent.)

A. Yes, sir.

643 1042 R. D. Q. And give them some name of designation to distinguish them from their best make?

(Same objection.)

A. They do.

1043 R. D. Q. What do the Coats people call theirs?

(Same objection.)

A. "National," I think they call it. They may have more than one brand for their seconds. "National" I have seen. The Willimantic call theirs "Shields."

1044 R. D. Q. You have stated that an object in using the word American in connection with your thread was to distinguish it from foreign makes. Did that name also distinguish it from all domestic makes; if so, how?

(Objected to as incompetent.)

A. We have been the only company that has used it as a distinctive mark.

1045 R. D. Q. Did your company ever buy out or have anything to do with the Willington Company?

A. No, sir.

1046 R. D. Q. Please look at Defendants' Exhibit No. 51, Coats *v.* Willington, and state whether it does not there appear that the thread, the marking of which was alleged to infringe the Coats' rights, was marked with the name Coats.

(Objected to as incompetent.)

A. I have looked at it, and it does so allege.

1047 R. D. Q. You were asked on cross-examination some questions as to the distance at which you could see the marks on spools of thread. Will you please state how far you can see the maker's name to distinguish it fairly on Nos. 8, 50, and 100 of Merrick's six-cord 200-yard thread?

(Objected to, as the subject was exhausted on cross-examination, and also as it is not a fair test for the witness to be asked
644 whether he can read a thing when he is told what it is that he is to read. If any test is made it should be with a number of spools having different labels, but the appearance of which is substantially the same at a distance.)

A. No. 8, six feet; No. 50, four feet, and No. 100, three feet.

(Complainants' counsel requests the examiner to note that defendants' counsel, before the witness answered the question, held the spools successively in the light directly in front of a window through which the sunlight was streaming and that the witness gazed intently at them for some moments before answering as counsel slowly advanced with them.)

The examiner notes, at the request of complainants' counsel, that defendants' counsel, before the witness answered the question as to spool No. 8, held that spool directly in front of a window through which the sun was streaming, but so that the sun did not fall upon the spool, and that defendants' counsel slowly advanced with such spool towards the witness, who was sitting beside the window with his back to it; that the witness gazed at the spool steadily and when he could read the name on the spool told defendants' counsel to stop, and the distance between the witnesse's eye and the spool was then measured; that the same thing occurred with respect to spool No. 50; that the same thing was done with respect to spool No. 100, except that the sunlight fell directly on this spool. The examiner also notes that the tests referred to took place in the same room in which the examination was being conducted. Complainants' counsel objects to the answer of the witness as incompe-
645 tent for the reason that a purchaser exercising ordinary care against deception in buying thread would not go through the formalities detailed by the examiner and would not know in advance what was the name on the thread, and would not be ani-

mated by the desire to read the name as far off as possible and probably would not bring it into or close to the sunlight.)

1048 R. D. Q. Have you made substantially the same tests with Coats' and with Clark's thread and with approximately the same results?

(Same objection.)

A. Yes, sir.

1049 R. D. Q. Can you readily distinguish the star on Merrick's label on the spools as far as or further than you can the name?

(Same objection.)

A. Yes, sir.

1050 R. D. Q. Can you readily distinguish the name on Merrick's as far as you can the number?

(Same objection.)

A. Yes, sir.

1051 R. D. Q. If Merrick's spools are held near enough to distinguish the number on the ticket is the name at least equally distinct?

(Same objection.)

A. Yes, sir.

1052 R. D. Q. And was it intended to be so?

(Same objection and as incompetent.)

A. Yes, sir.

1053 R. D. Q. And is that substantially the practice that has been followed for at least a quarter of a century by the sellers of spool thread in this country?

(Objected to as incompetent and leading.)

646 A. Yes, sir.

1054 R. D. Q. Which is most readily seen and seen from the greater distance, the number on the Merrick label or the number on the wooden periphery?

A. The number on the label.

1055 R. D. Q. Why?

A. Because it is larger and because the contrast of the black and gold makes it plainer. The number on the periphery is all the same color as the wood.

1056 R. D. Q. Which is more readily distinguished and from the greater distance, the Merrick name or the wooden number, and why?

A. Merrick name, because the contrast of the black and gold on the ticket makes it stand out more prominent.

1057 R. D. Q. Can you distinguish your spools by the name alone as far at least as you can Coats'?

A. Yes, sir.

1059 R. D. Q. Can your spools be distinguished by the shape and

size farther than Coats' can by the name, especially in the numbers most used?

(Same objection.)

A. Yes, sir; being larger, they are easily distinguished.

1060 R. D. Q. At about what distance from the eye do customers, as a general thing, look at a spool when they care whether they have one make or another or want to tell the number? Give it in feet or inches as near as you can.

(Same objection.)

A. I should think about a foot to two feet.

1061 R. D. Q. Have you since your cross-examination made rough tests upon the result of which you have answered the above questions as to distances?

(Objected to as immaterial, as the tests should have been made in the presence of counsel, and all the testimony of the witness based upon such experiment is objected to for the same reason.)

647 A. I have.

1062 R. D. Q. Please look at your answers to 636 to 639 questions and state whether you wish to make any correction in them.

(Objected to, as said testimony was given five months ago and the witness has been repeatedly on the stand since then and has abundant opportunity to make any correction necessary.)

A. I simply gave my opinion at that time. Thinking the matter over since, I might place the time it went out of the market a year or two later; I couldn't say certain.

1063 R. D. Q. In comparing the excellences of your thread and Coats', did you apply the test mentioned by complainants' witness, Auchincloss, in answer to questions 136 to 140?

(Objected to as not proper redirect; also as leading and because the witness should be asked specifically what tests he made and not refer to tests of other people.)

A. Yes, sir.

Examination adjourned to March 12th, at 10.30 a. m.

NEW YORK, *March 12th*, 1887.

Parties met pursuant to adjournment.

Present: Counsel as before.

The witness, L. R. HOPKINS, being further examined, says:

1064 R. D. Q. What expense have you incurred for the purpose of introducing your thread to the public and extending its
648 use in the matters of putting and keeping before the public the name of the Merrick Thread Company as the maker of the thread and especially your 200-yard six-cord thread?

(Objected to as incompetent, unless it be shown that the expenses were directly incurred in promoting the object referred to in the question.)

A. We have expended over $250,000 since we commenced to make 200-yard six-cord thread for the purposes named in that question.

1065 R. D. Q. State in what way.

A. For general advertising in the papers, for counter wrappers for cabinets, show-cards, large signs, small fancy cards, as we call them, sample spools and circulars, all of which we distributed free to dealers in our 200-yard spool cotton.

1066 R. D. Q. Is it the custom of thread-makers to keep secret the amounts manufactured of the various numbers?

(Objected to as incompetent.)

A. I think it is to a certain extent.

1067 R. D. Q. Look at the two spools of No. 80, Orrs & Macnaught thread, contained in defendants' exhibit, and state of how many cords you find them.

A. Four-cord.

1068 R. D. Q. If your thread is in any way made more salable or marketable by reason of the numerals stamped in raised figures upon it, state whether, in your opinion, that advantage legitimately flows from the fact that the numerals are put upon said thread, as shown in the Conant patent.

(Objected to as leading and incompetent.)

A. Yes, sir; I think it does.

1069 R. D. Q. State whether there has ever been any intention on the part of the defendants to in any way imitate the complainants' manufacture or mode of designating its goods, the subject-matter of this litigation, or whether they have ever sought to sell or
649 cause to be sold their goods for the plaintiffs, or to so mark them or put them up that they will be liable to be sold or taken for the plaintiffs' goods?

(Same objection.)

A. No, sir; never.

1070 R. D. Q. Do you repeat here, as a part of your deposition, the allegation on that subject contained in the answer filed in this cause?

(Objected to as not proper redirect and as not proper testimony itself unless the witness states the allegations on their substance.)

A. Yes, sir.

1071 R. D. Q. Have the defendants ever in fact, as you understand it, committed any act or caused others to commit any act which would lead or be likely to lead to any mistake as to who was the manufacturer of the thread made and sold by your company?

(Objected to as incompetent and leading.)

A. No, sir.

1072 R. D. Q. Are defendants' spools referred to distinguishable from others in any position in which they may be placed? If so, state how.

(Same objection.)

A. Yes, sir; if they look at the top label they will see the name plain; if they look at the other label they will see the name "American Standard;" if the spool stands on end and they can't see either label, they will see that the spool is longer.

1073 R. D. Q. Is the latter fact especially true in the numbers most generally sold and used?

(Same objection.)

A. It is.

1074 R. D. Q. State which thread is made nearest to the number of yarn, defendants' or complainants'.

(Objected to, as the witness has not shown his competency to answer.)

650 A. I think ours is the nearest.

1075 R. D. Q. Please mention one of the chief means by which the label number of the thread becomes defaced in the hands of the consumers on such labels as have the number near the circumference of the label instead of at the center; for example, Orrs & Macnaught, George A. Clark, Willimantic, the defendants', Kent's, Hadly Co.'s, Williston, J. Clark & Co.'s, and others.

A. When the spool is put on the sewing machine the numeral on the label designating the number very soon becomes defaced from friction in its turnings on the spindle.

1076 R. D. Q. Do you know of any other thread except Coats' which bears a black and gold label with concentric rings that has the number of the thread on the center of the label?

A. I don't recollect any.

1077 R. D. Q. Has that spot, to wit, the center of the label, been quite commonly used by thread-makers as a place for some designating mark, some trade-mark?

(Objected to as incompetent and leading.)

A. I think it has; we have always used the star in the center; others have used different marks which they have claimed as a connection with their trade-mark.

1078 R. D. Q. Complainants' counsel, in questions 943, 944, and 945, apparently sought to produce upon the court the impression that you were afraid or unwilling to answer these questions. Have you felt any such fear or unwillingness?

(Objected to, as the counsel has not sought to produce any impression, but the witness has himself admitted that he is afraid to answer the question either "yes" or "no," and has repeatedly shown his unwillingness to answer.)

A. No, sir.

651 1079 R. D. Q. For how long have your business and your opportunities been such as to require or enable you to become familiar with the kinds of spool thread upon the markets of this country, their qualities, and the ways in which they have been and are distinguished?

(Objected to as incompetent and leading, except as to length of time.)

A. Thirty years.

Further cross-examination by Mr. BETTS, counsel for complainants:

1080 Q. You are quite anxious to win this case, are you not?

A. I think we have been unjustly complained of, and, of course, I am anxious to get our case.

1081 Q. Don't you think that all the leading questions which have been put to you by your counsel on redirect examination and the attempt to explain away the statements which you have made on cross-examination would have been aptly and fitly summarized by asking you whether, in your opinion, you ought not to "get your case"?

(Defendants' counsel objects to the language "explain away" appearing in the question as an unfair qualification, because defendants' counsel thinks that the effort has been to free the subject from ambiguities and uncertainties produced by the misleading character of some of complainants' counsel's questions.

Complainants' counsel submits to the court that in this redirect examination every one of the so-called "efforts to free the subject from ambiguity" has been made by a grossly leading question, and the witness has in scarcely a single instance given his own views.)

652 A. Well, sir, I am not a lawyer and couldn't say whether they would or not, but I don't think they would.

1082 Q. How many years is it since you have had anything to do with selling thread at retail?

A. Since about 1860 since I sold at retail; 1858 to 1860, I should say.

1083 Q. Then, when you say that, "as a general thing, customers look at a spool at about the distance of a foot to two feet when they care whether they have one make or another, you do not speak from experience, do you, within the past twenty-five years?

A. It is a matter of my best judgment from what I have observed and seen.

1084 Q. Do you know whether it is customary in the shops where both complainants' and defendants' thread is sold to place the spools of the same number made by each of those manufacturers side by side, so that people can readily detect by comparison the slight difference in length?

(Defendants' counsel objects to the unfair use of the word "slight," because the difference in length has been proved to be at least that

of one or two numbers of thread, so that Merrick's 50 is as long as Coats' 40, and Merrick's 60 is only a very trifle shorter than Coats' 40, and Merrick's 70 is considerably longer than Coats' 50, etc.)

A. I think, as a general thing, retail dealers of spool cotton keep each manufacturer's thread in a cabinet furnished by that manufacturer; some of them may mix them more or less, putting different manufacturers into the same cabinet, but not generally.

1085 Q. I now take the spools of No. 12 thread from the Defendants' Exhibit No. 48, one made by the complainants' company, one made by the defendants' company, and one made by George A. Clark, and I take also three spools of No. 36 thread, one made
653 by each of the same makers, and I place one spool of the No. 12 thread at random on the table before you, with its side towards you so that you cannot see the label, and I also place one of the No. 36 spools in the same way beside it, both being at the distance of about five feet from you, and I ask you to state of whose manufacture each of those spools is.

A. I couldn't tell you. If you will place one of ours, one of Coats', and one of Clark's of the same number on end I think I can pick out ours at once side by side.

1086 Q. Why cannot you tell if they are placed there singly?

A. Because I can't carry in my mind the exact length of the spool of each number of thread of any make.

LYMAN R. HOPKINS.

Examination adjourned for two weeks at request of complainants' counsel.

NEW YORK, *Nov. 15th*, 1886.

Met pursuant to adjournment.

Present: Counsel as before.

ALEXANDER KNOX, a witness of lawful age produced on the part of defendants, being by me first duly cautioned and sworn to speak the truth, the whole truth, and nothing but the truth in the matter in controversy herein and being examined by W. C. WITTER, Esq., of counsel for defendants, deposes and says:

1 Q. What is your name, age, residence, and occupation?

A. Alexander Knox; 79 years old. I live at 38 West 17th street, New York city, and have lived there 26 years, and I retired from business about 12 years ago.

654 2 Q. What was your business previous to retiring?

A. For nineteen or twenty years I was the general agent in the United States of the Orrs & Macnaught cotton thread in this country.

3 Q. Where did Orrs & Macnaught make their thread?

A. In Glasgow.

4 Q. When did your agency commence?

A. They applied to me in 1854. The year before there was a young man who had a little shipped to him at Philadelphia.

5 Q. Do you remember in how many numbers the Orrs & Macnaught thread was sold by you at the outset on spools?

A. They sent it in assorted cases in numbers from 8 to 100, but afterwards from 150 to 200.

6 Q. Describe the labels that were used on this thread during the twenty years.

A. There was a black and gold label with Orrs & Macnaught and best six-cord on it; also the words "200 yards" and "warranted"—I think it was abbreviated; also the number of the thread, which was in the center of the label at first and subsequently at the base of the label.

7 Q. Were those marks and colors arranged crossways of the label or in circles?

A. In circles, I think, except the abbreviation "warranted."

8 Q. Please describe the label on the other end of the spool.

A. It was a white and black label, embracing the words "Alex'r Knox, general agent." It had after "general agent" either "for the United States" or "in the United States." There was a number which also referred to the sizes of a thread which had been popular in the United States; at least I have always supposed so.

9 Q. What thread do you refer to as having been popular?

A. Parsons' thread, spool thread.

655 10 Q. What was the shape of the labels on the Orrs & Macnaught thread?

A. Circular.

11 Q. To what extent was the Orrs & Macnaught thread sold through you in this country?

A. Several millions of dozens. It was a very popular thread during all that period.

12 Q. To what part of the country was it sold?

A. As it became known it was sold everywhere where it became known, from New York to California and from Maine to Louisiana.

13 Q. Please look at the spools of thread in the second row of Defendants' Exhibit No. 48 and state whether you recognize them as correct specimens of the Orrs & Macnaught spool thread and the labels upon them, which you were agent for and sold in this country for a period of twenty years.

A. Yes, I do; nineteen or twenty years.

14 Q. Please also state what is the color of the thread on those spools.

A. Fifteen white and one black, I think.

15 Q. Please look at Defendants' Exhibit No. 6 and state whether that is also a specimen of the spools and labels of Orrs & Macnaught thread to which you have referred.

A. It is.

16 Q. Which was the oldest manufacture, the Orrs & Macnaught or the Coats spool thread?

A. Well, now, that is a question that is beyond my knowledge. The Orrs & Macnaught thread was identical with the R. F. & J. Alexander thread, Orrs & Macnaught being junior partners of that

firm and succeeding the firm. The originators of that firm, R. F. & J. Alexander & Co., manufactured their thread from the same raw cotton, spun the yarn, and produced the thread, being the only manufacturers in Scotland who did so, except John Clark, Jr., & Co., of Mile End, Glasgow. These were the only two spinners of their own yarn in Scotland preceding J. & P. Coats, who, as far as I have known, have never spun their yarn at all. Hence the
656 thread of R. F. & J. Alexander & Co., to the best of my information, was imported into the United States under that name before J. & P. Coats.

(That part of the answer founded on "information" objected to as incompetent.)

17 Q. When the Orrs & Macnaught thread like the exhibits first came to you—that is, in 1855—what numbers of it were six-cord?

A. All numbers from 8 to 45.

18 Q. What numbers of Coats' thread were six-cord at that time?

A. From 8 to 46, their 46 being the same size as our 45.

19 Q. Who first advanced the six-cord beyond that number?

A. Orrs & Macnaught, at my suggestion.

20 Q. Who next made six-cord higher than 45?

A. George A. Clark, the agent in this country of J. & J. Clark, of Paisley.

21 Q. Do you remember any conversation with George A. Clark on that subject?

(Objected to as incompetent and immaterial.)

A. I do.

22 Q. State it as near as you remember it.

(Same objection.)

A. George Clark called upon me and said: "Mr. Knox, how can you afford to make 60 six-cord?" I replied: "I am not a manufacturer and cannot tell the cost."

23 Q. Who followed next in advancing a six-cord thread into numbers higher than 45? I mean next after the Clarks.

A. I was going to say this: While George A. Clark was speaking to me on this matter he was speaking to my manufacturers the reverse, and saying to them—I don't mean the reverse; it was the same thing, and he was the first who produced a four-cord
657 60, to my astonishment, in my thread; I immediately wrote to my manufacturers this circumstance and complained, while he, George A., immediately brought out or produced his 60 six-cord under a new title, "Our New Thread," abbreviating these words into "O. N. T.," by which the thread is still known; my manufacturers returned to the six-cord 60 after my complaint; it is impossible for me to say who next followed; there were so many domestic manufacturers here—domestic and foreign both—French and English and Scotch; in the progress of time there appeared to be a simultaneous disposition on the part of the two Clarks, the Mile-end and the Paisley Clarks, and the Coats to raise the strands

of their threads from three and four cord to six-cord to No. 100, inclusive.

24 Q. About when was that?

A. I couldn't say; I said it was in the progress of time; it came upon me like a thunder-clap; I was quite confident my manufacturers would not make that advance in the number of strands in their thread; I might add both Clarks and Coats were establishing manufactories in the United States; and the increased duties during the war on imported threads I was satisfied could not be borne profitably by foreign manufacturers, and I did not wish individually to embark in the cares and anxieties of establishing and conducting a new manufacturing establishment here; the late A. T. Stewart was engaged in an enterprise and my friends said they did not want to enter into competition with him.

25 Q. If I understand you the Coats people did not make their spool thread six-cord above their 46 until after the Orrs & Macnaught and the Clarks had made that advance; am I right?

A. You are right.

26 Q. What does the number on the reverse label of the Coats thread indicate?

A. The distinctive number of a previously popular thread, Parsons' thread, corresponding with the number on the black and
658 gold label of Coats', indicating that the two numbers represented the same size of the respective threads.

27 Q. In what year did you leave the agency for the Orrs & Macnaught thread?

Q. I think it was 1874; I cannot answer more clearly now.

28 Q. Was the business during your agency of 19 or 20 years for the Orrs & Macnaught spool thread a continuous and a prosperous business in this country? If yes, mention any evidence of its prosperity which occurs to you.

(Objected to as leading and calling for a conclusion.)

A. Yes; the evidence I have is that they built a new mill or mills in Croft Head, near Glasgow, in order to increase their production; I think that is the name of the place.

29 Q. State why you retired from the agency personally.

A. My health becoming impaired.

30 Q. How did the price at which this Orrs & Macnaught spool thread was sold compare with the price at which Coats' thread was sold?

A. One-ninth; well, say the Orrs & Macnaught was sold at 10 per cent. less—forty instead of forty-five cents a dozen; my instructions in 1855, when the first shipment arrived, were to open the price at five cents below Coats' per dozen.

31 Q. State whether the Coats people ever complained of the use by Orrs & Macnaught of the black and gold or the white and black label on their spools.

A. Never, to my knowledge; what they did to buyers I don't know.

32 Q. Do you know of their complaining of the way in which the Orrs & Macnaught put up their thread in any other respect?

A. I do not.

33 Q. Did you ever know or hear of the Orrs & Macnaught spool thread being mistaken for the Coats?

659 A. Never.

34 Q. Look at the Merrick Company's spool thread appearing in the sixth row of Defendants' Exhibit No. 43, and state whether, in your opinion, that thread is likely to be mistaken for the Coats thread appearing in the first row by either wholesale or retail buyers.

(Objected to, as no competency is shown to answer the question.)

A. Not at all.

35 Q. Why not?

A. By all the ocular evidence I can devise in my own mind; I can't speak for others; according to my judgment, it would not.

36 Q. You say that the situation of the number on the black and gold label of the Orrs & Macnaught thread was changed from the center to the outside. Do you remember when that was?

A. I do not.

37 Q. Or why?

A. Yes; it was to retain on the spool after having been used on a spindle, thereby obliterating the number—to retain the number in the work-basket of the seamstress.

38 Q. I notice that most of the spools of Orrs & Macnaught thread have an embossed design of some variety or other upon the wooden periphery of the spool and surrounding the label. State whether or not that was a general practice with the Orrs & Macnaught and with other threads during the time of your agency.

(Objected to as leading and calling for a conclusion.)

A. I think so.

(Answer objected to as incompetent.)

39 Q. Was it the practice of Orrs & Macnaught? Can you answer definitely?

A. I cannot more definitely.

660 40 Q. What do the words and figures "200 yds." on the label of spool thread mean?

A. They mean that the spool contains that length of thread.

41 Q. What does the words "best six cord" mean on such labels?

A. They indicate the quality of the thread.

42 Q. What do the numbers 8 to 200 mean?

A. The size or grist.

43 Q. What does the name Orrs & Macnaught, Clark, Coats, Merrick, etc., appearing on these labels, mean?

A. They are supposed to mean the manufacturers' names; they don't always mean that, however.

44 Q. Give an example of what you mean when you say "they don't always mean that, however."

A. I can give a number of examples, two of which I would name: George H. Stewart, of Philadelphia, one of the firm of Stewart Bros., and Thomas Mellor, of Philadelphia, deceased, and numerous other parties. When a person gave a large order for thread it was the habit or custom to put the person's name ordering the thread on the label, without any indication of by whom it was manufactured or any guaranty of quality or length.

45 Q. Was it the idea that the public would suppose the person whose name appeared on the thread to be the maker?

A. I presume so. I remember that a gentleman, Thomas Mellor, a notion dealer in Philadelphia, who in the early history of his mercantile operations came to the United States to be clerk with an uncle, and subsequently established business for himself, hadearly given orders to Coats, in about 1830 or 1832, for annual or semi-annual supplies about ten years before Coats established an agency here; these orders were for quantities of spool cotton having his own name and no manufacturer's name. He told me that Andrew Coats had said to him, "Thomas"—this was perhaps twenty years after the other date, about 1850 to 1855—"Thomas, you
661 are a very old customer of ours and we don't like to refuse to fill your orders, but we take no orders now in that way; we want to have our own name on all our thread, and we want to buy you off." "Well, I'll think of it; I'll tell you." Thomas had had inquiries for 20 years for Mellor's spool-cotton thread. Thomas told me when he and his wife, Mrs. Mellor, were on their summer vacation he would get her to go out and inquire for Mellor's thread at the stores in the place where they might be. He therefore concluded it was worth something there was an increasing demand from those points. He therefore thought, I think that if a couple of thousand dollars were invested in six per cent. stocks it would yield about as much income as his sale of thread amounted to, or would amount to—that is, Mellor's thread. The bargain was then made, the money paid, two thousand dollars. Andrew Coats, six months or a year afterwards, being in the store, looked up at the shelves, and said: "Have you not got rid of that thread with your name on yet, Mellor's thread?" "Oh, yes," said Thomas, "I have sold all of your manufacture, but I have supplied myself from another manufacture;" so he kept supplying the inquirers with Mellor's thread, though it was not Coats' manufacture, and he was fair in the transaction, showing that the name did not indicate the manufacturer.

(Objected as incompetent and hearsay.)

46 Q. When you gave up the agency of the Orrs & Macnaught thread, were there people who wanted the agency?

A. Oh, yes.

47 Q. When Orrs & Macnaught thread, during your agency, was advanced in six-cord make to 50 and 60, of how many cords were 70 and 80 made?

A. They were first three, and I made them four; 90 and 100 were three.

Adjourned for lunch.

662 48 Q. Referring to your 45th answer and the bargain between Thomas Mellor and Andrew Coats, what was it that you understood Thomas Mellor got two thousand dollars for?

(Objected to as immaterial and calling for hearsay.)

A. As I have stated at the commencement, Andrew Coats said, "Thomas, we don't like to refuse any of your orders, but we have made a resolution not to have thread of our manufacture imported under any other name than our own hereafter. At the same time we want to acknowledge our appreciation of your previous custom, and we want you to mention a sum which, in your estimation, will indemnify you for our thus cutting you off from putting your name on our thread."

(Answer objected to as hearsay.)

49 Q. You have spoken of R. F. & J. Alexander preceding Orrs & Macnaught in the making of spool thread; state whether this spool thread also bore a black and gold circular label upon it, with the name of the maker.

A. It did; once or twice I found they had made a mistake and sent a case of that thread with that label upon it, instead of the Orrs & Macnaught thread. We couldn't reship it because it was part of a case which contained six of these tin packages, and we couldn't dispose of it because nobody would think it was the same thread; couldn't sell it at regular prices; we could dispose of it at auction, of course—a thing which I never did during the nineteen or twenty years I was in the business. At last I sold all the stock at auction, when I closed up the business, in consequence of severe illness.

50 Q. State whether the A. T. Stewart thread that you have referred to bore a black and gold label with his name on it.

A. I can't distinctly state that.

663 51 Q. What is your impression about it?

(Objected to as incompetent, as the witness has said he cannot tell distinctly.)

A. My impression is that it had, for this reason: A. T. Stewart's first attempt consisted in finding a man named Clark, in Paisley, who was no relation to the other Clarks in Paisley, but who started a thread mill to supply Stewart with thread, and on that thread label was the name J. Clark. The enterprise was a failure there, and the said gentleman came to Mattawan or Wappinger's Creek and established a manufacture there; that was also a failure. A. T. Stewart was a customer of mine in his manufacturing department and in his notion department after he had ceased buying Coats' thread or keeping it in his stock.

52 Q. How long have you been familiar in this country with labels of black and gold in concentric rings with the maker's name upon it and used upon one end of spools of thread?

A. I copied the invoices in 1821, when my grandfather came with the first shipment. The first shipment came by the ship "Camil-

lus," from Greenoch, in 1821. My father afterwards owned the ship "Camillus."

53 Q. For how many years, then, have you been so familiar with such labels upon such spools of thread in this country?

A. Sixty-five years.

54 Q. State who, if you know, were importing thread labeled in that way to this country in the twenties.

A. My father, until 1823, imported that thread, the John Clark, Jr., of Mile End, & Co.; in 1824, 1825, 1826, and 1827 he imported the thread of J. & J. Clark, of Paisley, on spools; previous to and including 1821 cotton threads were imported in balls and sold by the pound.

55 Q. How long did the J. & J. Clark thread on spools with the black and gold label continue to be sold in this country, as near as you can state?

664 A. I cannot state the length of time, the precise time, but I know that after my father ceased to import it they consigned to James Lee, who, as far as I know, never attempted to introduce it except by selling invoices to jobbers in New York city and allowing it to accumulate in his loft until he was instructed to dispose of it in that or any other way.

56 Q. Who, if you know, were J. & R. Clark?

A. They were the sons of James Clark, of Paisley, partners of J. & J. Clark, and cousins of George A. Clark.

57 Q. J. & R. Clark also introduced a spool thread with a black and gold label in this country, did they not?

A. Yes; they did.

58 Q. Will you please look at the Defendants' Exhibit No. 22 and state whether you recognize that as a specimen of spool thread with the J. & J. Clark label upon it that you have above referred to?

A. I do.

59 Q. And will you look at the spool now shown you and state whether that is a specimen of what you refer to as the J. & R. Clark thread, spool, and label?

A. It is.

(Defendants' counsel puts the said J. & R. Clark's spool in evidence and it is marked "Defendants' Exhibit No. 52, J. & R. Clark Thread and Label, W. H. K., notary.")

60 Q. Do you remember when J. & R. Clark were put into the business and by whom?

A. Subsequently to 1855; their father told me about the close of 1854 his intention to put them in business the next year—that is, independently of their previous connection; they were previously connected with J. & J. Clark; in 1854 they were out of that connection.

61 Q. And if I understand you, the use of J. & J. Clark
665 spool and label was continued up to the time when J. & R. Clark spool and label came upon the market; am I right?

(Objected to as leading.)

A. Up to and afterwards; I see on this J. & R. Clark; I see it is made expressly for the Grover & Baker Sewing Machine Co.; Grover & Baker were important customers of mine here for several years; they established a branch of their office in London, and they applied to me on what terms I would supply that London branch with the cotton they were receiving from me in New York. Of course the thread I had, having paid duty in the United States, it seemed to be absurd to send that thread back to London; I therefore mentioned the matter to Orrs & Macnaught and referred Grover & Baker to them for the terms on which they would supply the thread to Grover & Baker machine in London and elsewhere. Orrs & Macnaught, being very much pushed to keep me supplied in New York, made propositions to the agent of Grover & Baker in London as to the terms on which they would supply him. It was about at the commencement of the civil war in the United States, and they in their proposition declined to sell to him on credit, demanding cash on all purchases. This nettled O. B. Potter here, the president of the company here, to be refused credit in London, and therefore they made the arrangement with J. & R. Clark which produced that label for London supplies.

62 Q. Do you mean that the J. & R. Clark thread with the Grover & Baker label upon it was made exclusively for Grover & Baker's London supplies?

A. I can't answer that question without qualification; the qualification is this: Alexander King came out as agent for J. & R. Clark. He sold thread to Grover & Baker in New York, and Mr. Denny, the manager of the company here, and I think also Mr. Potter, the president, not being able to procure all they wanted from King, came to me again and then he said that I had just lost one
666 hundred thousand dollars by that action of my principals in Glasgow; then they began to claim a distinct reduction in price for the fine numbers; previously we, the importers, had sold all numbers at one price; then they claimed, what I could not deny, that the sterling value consisted of three rates of prices, and they therefore claimed ten cents per dozen between all numbers over 60 and all numbers below and including 60—that is to say, in all numbers over 60 they claimed to purchase from me at ten cents per dozen less than the prevailing price to the trade for all numbers, and this ultimately resulted in George A. Clark, very much to the surprise of Alexander King, purchasing from J. & R. Clark their entire mill and threw King out of the agency altogether; then he became agent for Ashworth's thread. He told me they did not pay expenses. The Grover & Baker sewing machine required the use of four or five times the amount of fine thread that they did of coarse. They used 80 above with 120 below, and 100 above with 150 below. There was very little of those fine numbers used before these machines were introduced.

63 Q. Do you mean that the J. & R. Clark thread was sold only to Grover & Baker Company, or that it was on general sale in the United States and Grover & Baker was one of their customers?

A. It was on sale to whomever wanted to buy. Grover & Baker

were his first purchasers, I believe. I have no doubt of it at all. When George A. Clark purchased the mill of J. & R. Clark and thereby utterly destroyed King's agency, J. & R. Clark gave King letters to Ashworth for whom he became agent. Ashworth's thread was an utter failure also.

64 Q. Look at the spool of thread now shown you and state whether that is an example of the thread which A. T. Stewart undertook to put upon the market in conjunction with J. Clark, to whom you have referred.

667 A. I think it is. I have no doubt of it.

(The said spool is put in evidence and marked "Defendants' Exhibit No. 53, A. T. Stewart Clark Thread and Label, W. H. K., notary.")

Adjourned to Nov. 17, 1886.

NEW YORK, *Nov.* 17, 1886—11 a. m.

Met pursuant to adjournment.
Present: Counsel as before.

Continuation of the examination of ALEXANDER KNOX:

65 Q. What does "six-cord" mean as applied to spool-cotton thread?

A. It means three strands of double thread, twisted or doubled together, originally called cabled thread; three strands of the two-cord thread would be two threads twisted together—two threads—that is, two yarns; the four-cord, two of those double yarns twisted together, making a second twist, involving a double operation, requiring a machine as well as time; the six-cord was three of the double strands twisted together. I have seen nine-cord thread, which consisted of three cords of three strands each, involving a double operation.

Spool-cotton thread at first was manufactured in the factories where they manufacture the yarns; after a number of years it was found not the best method of making the very best spool-cotton thread, because the owners of spinning mills found that a spinning mill could be run to the best advantage by confining its productions within a certain range or extent of cotton-yarn numbers, higher numbers requiring finer grades of cotton wool than coarse

668 numbers; the time lost in changing from coarse to fine numbers and *vice versa* and the impossibility of preventing the mixture of superior cotton wools with inferior cotton wools—that is, cheaper wools would produce a thread of uneven quality, some thread being of coarse wool when it ought to be fine and some of fine when it ought to be coarse, thereby imperfect, as a thread required for sewing machines ought not to be; hence, in an economic as well as an improved method of manufacturing spool-cotton thread, a new system was adopted in Great Britain; I embrace the English and Scotch mills. It was to select the productions of the most celebrated yarn mills suitable to the various numbers of spool-cotton

thread and use their productions exclusively for the manufacture of various numbers of spool thread; that was to prevent mixture and secure the best yarns suitable for the different numbers of threads. This proved of very great advantage to those manufacturers who did not spin any yarn but supplied themselves from these various sources.

The system of gauging yarns is entirely different from that of gauging threads; when we speak of yarns we mean a single twisted cotton yarn. The gauging of yarn is this: the number of skeins or hanks, each consisting of seven leas of eighty rounds on a reel a yard and a half in circumference, making 560 rounds or 840 yards in length; the number of these skeins or hanks in a pound constitutes the number of that yarn; for example, ten skeins would indicate No. 10; a hundred skeins would indicate No. 100 of yarns; but the system of numbering cotton thread is entirely different and on a different basis and not subject to stationary law, but to the fancy or caprice of the thread manufacturer, thread being sold by the yard and not by the pound.

When sewing machines were introduced I discovered that an entirely different quality of thread was required for their successful use than had been required in simple hand-sewing and that
669 this thread could be produced at a decidedly cheaper cost. This will be obvious to any observer when he reflects that a seamstress usually takes from a half to three-quarters of a yard for her needle, and that she has to use up that length of thread before resupplying the needle; therefore the friction encountered by the thread in passing through the material being sewed will, unless the thread is hard twisted, become fuzzy or towy, hence the necessity with tailors, etc., of putting on wax to prevent that fuz-. In sewing machines the thread is taken from the spool by the stitch, stitch by stitch, and is not exposed to that friction, and a much lighter twist is necessary, because a hard twist is disposed to kink in taking the loop necessary to take in a sewing machine and thereby break the needle, which costs about ten cents—that is, it cost about eight or ten cents at that time at the introduction of sewing machines; hence you will perceive that in giving less twist, involving less time, you could produce a larger quantity of thread best for sewing machines and leaving what was considered the best thread for hand-sewing almost useless for sewing machines, while the best for hand-sewing costs considerably more than the last; for example, it is perfectly evident that if on one inch of a certain number of thread you put 80 turns or twists and on the latter thread 60 turns on an inch you make a cheaper thread because you turn out a larger quantity in the same time and do far better for sewing-machine use. These were the suggestions I made to Orrs & Macnaught and induced them to place the price of their thread lower, because it cost less; you could turn out twenty per cent. more.

66 Q. You stated in answer to 11 Q. that this Orrs & Macnaught thread was sold through you in this country to the extent of several millions of dozens. Will you give some more definite idea of

the extent of the use and sale of that thread in this country by mentioning instances of sales of large amounts?

670 A. Yes; I recollect distinctly one application to buy my entire stock by Hoyt, Sprague & Co. for a Philadelphia house. It happened during the war, about 1862 or 1863, I think. I had an application for my entire stock. The parties who applied allowed me to make inquiries regarding their standing. I made an inquiry of one banking-house who said, "Oh, you are selling to the Bank of Commerce; sell any amount you please; you are selling to the Bank of Commerce." I inquired of another, private foreign bankers, and stated that I did not like the idea of selling my whole stock. The price was then $1.04 a dozen. That was the offer they made. When they called I said, "I won't make an invoice of all my stock; I don't like the idea." This was a ten-days' credit, cash in ten days. "Well, what amount will you invoice?" they said. "Well, I will invoice about ten thousand dozen," I replied. "Well," they said, "make three invoices of ten thousand dozen each—two invoices of white, 10,000 each, and one invoice of colored, 10,600." I made about three invoices to them of 28,500 dozen. Numerous other parties, such as Tefts, Griswold & Kellogg, took invoices of about ten thousand dozen. Grover & Baker took one or two of five thousand. They were constantly taking all the time. Wheeler & Wilson—they were old customers, too—they took large invoices. Potter Palmer, of Chicago, also took two or three invoices of five thousand. Calhoun, Robbins & Co. and other firms took large orders—all I could supply to them. What Grover & Baker took was chiefly fine, the other was assorted.

67 Q. Please tell us how much you ordinarily had in stock as a general rule.

A. That is utterly impossible for me to say. I was constantly sending them orders for special numbers which they couldn't supply. I got disgusted with the disappointments. One instance I recollect. The agent of Grover & Baker in St. Louis called and gave a special order for special colors, according to the

671 sample box I had here, of which I had three boxes here. One I kept in New York, another I sent to St. Louis, another I sent to California. He ordered either 18 or 36 cases—I forget which—and there was so much delay in getting the order filled that previous to its being received another order was given to duplicate it, and about the same time both orders were shipped to me. They took the first and left the second on my hands for a time, they receiving from time to time, as they ran out of different colors, supplies from the order I had in my hands. At a period I declined to receive any orders except at prices ruling on arrival.

68 Q. In answer to 11 Q. you were understood to have stated that this Orrs & Macnaught thread was a popular thread during all the period of its sale in this country. I understand you wish to qualify that in some respect. Please do so.

A. My intention was to say that from the time it became known it became popular. Of course it was not popular when the first shipment was received. Mr. Wheeler, of Wheeler & Wilson, said

that if they had known that I had such a thread they would not have interested themselves in the Willimantic Company to the extent they did.

69 Q. I understand you to say that your answer to 30 Q. needs some addition. Please make such addition as you desire.

A. As time wore on they admitted me to be one of the clique, so to speak, and sent me notices of any changes in prices and terms—I mean the Auchinclosses and George Clark the same—and I did the same to them. There were two agents of the Coats people. The second one was obtained at my suggestion to Mr. Coats. Mr. Coats applied to me—Andrew Coats—stating that there were numerous parties in New York that would like to have the agency besides the Auchinclosses, the Auchinclosses being selling agents for the concern in Paisley, Andrew Coats and his partner, Mr. Bates, being agents in Philadelphia for a certain amount of the manu-
672 facture. The fact is his father, old James, of Paisley, said that Andrew had been so industrious in introducing their thread that he deserved quite a consideration from the firm, and the old gentleman had insisted that Andrew should be supplied with at least 50,000 dozen a month. This being more than they could conveniently carry at times during the year, he wished I would think over it and recommend some respectable New York house who would be able to make advances to them from time to time on consignments of their thread to New York. As Coats & Bates' interest and the Auchinclosses' were not identical I mentioned the name of James McCall & Co., of New York, and introduced him to them. The firm of James McCall & Co. consisted of Samuel D. Bradford, of Roxbury, Mass., James McCall, Hamilton McCall, and Joseph W. Strong. Resulting from that introduction that firm were appointed the New York agents for Bates & Coats. Soon after that firm dissolved in consequence of the death of Hamilton McCall in Paris, and two new firms resulted—McCall, Blake & Fairchild, afterwards Fairchild & Fanshawe, in New York, and then Strong & Smith, who became another firm emanating from the original firm.

70 Q. Which is the best thread?

A. The six-cord, unquestionably.

71 Q. Was that the reason why, upon your advice, Messrs. Orrs & Macnaught advanced their six-cord make into higher numbers?

A. It was.

72 Q. And do you understand that to be the reason why still further advances have been made by manufacturers?

A. I do.

73 Q. Which costs the most to make, six-cord or three-cord?

A. Oh, six-cord; higher; nearly double—not in stock, of course, but in labor and time.

74 Q. Were or are you familiar enough with the details of thread manufacture to know what numbers of yarn were the proper numbers to make the various numbers of thread respectively?

673 A. No; I am not.

75 Q. State whether the Alexander thread with the black and gold label, which preceded the Orrs & Macnaught, was im-

ported into and sold in this country; and, if so, what part of the country mostly and during what years.

A. It was imported and sold in this country in Louisiana chiefly. I couldn't say positively the time. It may be yet.

76 Q. How did the Alexander black and gold label differ from the Orrs & Macnaught black and gold label?

A. So far as I remember, I think it only differed in the name.

77 Q. Did you make any attempts to sell the Alexander thread which you say was sent to you by mistake?

A. I did; several.

78 Q. Why didn't you succeed?

A. I couldn't find anybody who would have it.

79 Q. If it had had Orrs & Macnaught's name on it instead of Alexander's could you have disposed of it?

A. Certainly.

80 Q. State whether, in your opinion, that Orrs & Macnaught spool thread was likely to be mistaken for the Alexander's.

A. No; I can't conceive that possible?

81 Q. Why not?

A. Because of the difference in the name.

82 Q. State how distinctly you remember the use of ornamental designs on the Orrs & Macnaught spools outside of the label.

A. I recollect from the commencement they did have ornamental designs, but I can't state how many or just what they were. So far as I recollect, the exceptions where they had no designs were rare or accidental.

83 Q. What percentage of the Orrs & Macnaught thread that you sold was of numbers higher than 100?

674 A. I couldn't tell with any accuracy. It is a mere supposition.

84 Q. Do you think it was as much as ten per cent.?

A. Decidedly more.

85 Q. About when should you say it was that the Clarks, the Coats, etc., advanced the six-cord make to 100?

A. Somewhere from 1870 to 1873. I did not feel like—I was not willing to embark in that enterprise at my age; besides I thought I was able to live without it.

86 Q. Please state whether the black and gold label upon the spool thread introduced by John Clark, Jr, & Co. into this country early in the century had a silver ring upon it.

A. It had not. I refer to 1821 and the following years.

87 Q. And in that respect the label differed from the label on the John Clark, Jr., & Co.'s thread appearing in row 3 of Defendants' Exhibit No. 48?

A. It did.

88 Q. When did the Coats people cease putting up their six-cord thread in papers and begin putting it up in boxes, if you remember?

A. I could not exactly say. I think it was about a year or two previous to my retiring from business.

89 Q. If you can do so, will you please explain how the J. & J. Clark thread came to be imported into this country?

A. A bill of exchange for five hundred pounds being sent to John Clark, Jr., of Mile End, for a supply of their thread to that amount, and they having replied that, in consequence of an agreement with a house in Glasgow which had made them a loan of ten thousand pounds sterling to enable them to meet all their financial engagements then existing in consequence of their establishment in the previous year, 1820, of the Mile-end mills, they had engaged to the said party to consign to said party for a period of twenty
675 years all the production of thread in said mill coming to the New York market, they could not fill the order and asked what they were to do with the five hundred pounds. They were told to hand it to J. & J. Clark, of Paisley, to be supplied with their manufacture of thread, and that importation was the first I knew of J. & J. Clark thread coming to New York in 1824.

90 Q. State whether you were personally and well acquainted with James Clark, of J. & J. Clark; John Clark, Jr., of Mile End; J. & R. Clark, George A. Clark, and others of the Clarks; also with J. & P. Coats, James Coats, the second James Coats, and the third James Coats, now in Pawtucket; also Orrs & Macnaught and the Alexanders.

A. Yes; with the exception of the Alexanders, whom I did not personally know; the other gentlemen I knew personally.

91 Q. How intimately did you know members of the Coats family?

A. They have entertained me at Paisley and I have entertained them at New York; they have also entertained me at Andalusia, on the Delaware, the country seat of Andrew Coats.

92 Q. May I ask if you own the house and property where you said you have lived twenty-six years?

A. I purchased it in October, 1860. I moved in at that time and have lived there ever since, except in summer time.

93 Q. Do you own other real estate in the city?

A. Yes; I own a lease in Church street. I used to get $9,500 a year for that.

94 Q. And I believe you own property at the seashore; if so, where is that?

A. Oak's Bluff, Martha's Vineyard, Dukes county, Mass.; that is in my wife's name—her property.

676 And being cross-examined by F. H. Betts, Esq., of counsel for complainants:

95 Q. Were you ever engaged in the manufacture of spool-cotton thread?

A. I was not.

96 Q. Or in the manufacture of thread of any kind?

A. No.

97 Q. Or of yarn?

A. I was some time engaged with my father in a spinning and weaving mill in this city.

98 Q. When was that and what did you produce at that mill?

A. I was engaged in the manufacture of cotton goods from the time I was a lad till 1836, about 20 years; my father was a manufacturer of cotton goods, and I had a loom where I wove when not at school. I think I earned seventy-five dollars one winter at the loom.

99 Q. Are you a native of this country?

A. No.

100 Q. Where were you born and when did you come to the United States?

A. I was born on the 3d of February, 1807, in Paisley, Scotland; went first to school in England in 1811 and 1812, where my father resided at that time. I returned to Scotland in 1812, where I went to school till 1816, when I was brought to the United States.

101 Q. What was your business in 1854, at the time you were solicited to take the agency for the Orrs & Macnaught thread?

A. I was not engaged in any business in 1854.

102 Q. How long had you been out of business at that time?

A. About ten months. I went abroad on some business in September, 1854, and was on business in the British isles, France, and Belgium and Prussia, and returned in January, 1855.

677 103 Q. And in what part of the year 1854 was it that you were solicited to take the Orrs & Macnaught agency?

A. I think it was in October, 1854. I was in Glasgow and Paisley on business, and when in Paisley I accidentally met an old acquaintance, the uncle, Robert Orr. Mr. Orr was surprised to see me and I he; he had been frequently in New York as a merchant and in New Orleans; his brother William and he were partners in Glasgow and were consignors of a cargo of cotton; I think it was from New Orleans, that cotton; the ship "Oglethorpe" belonged to my father; he owned four ships, and I owned one of the five of the line I established to the Clyde. He said, "Now, I am not living in Paisley at present; I am living at the Largs (a watering place on the Clyde), but I shall be most happy to have you come down to spend a day or two with myself and family." I told him I was not sure that I could come on Saturday or Sunday, but I would be very happy to avail myself of the invitation before I returned to the United States. The following week I arranged so that I could go down on Saturday, and on the steamer going down I observed two gentlemen who were then strangers to me, and, as I was fond of machinery and interested, I paid particular attention to the operations of the engine. When we arrived at the wharf at Largs I immediately stepped ashore and proceeded, according to the directions of Mr. Orr at the interview we had, towards his country residence. I saw him standing in front of the gate at his grounds, looking down the road towards the landing. "Oh, man," said he, "I am rejoiced to see you. I was afraid when you did not come last Saturday that we were not going to see you; come with me up to the house and I will introduce you to my wife and friends; by the by," says he, "did you see my nephews on board? They were to come down on that boat." I said I didn't recognize them; by and by they ar-

678 rived at the house and were introduced to me there at the

house; we had dinner and spent a pleasant evening and night and went to church Sunday morning with Mr. Orr and family. We returned to the house, had Sunday dinner, and the young men thought they would like to stroll on the hills in the afternoon and asked me which I preferred doing, accompanying them or going to church with the family. I preferred the latter. I spent the night until Monday morning. We all came up in the boat to Glasgow, and I was asked if I was disposed to accept an agency in the United States. Mr. Robert Orr and his brother William were acquainted with my grandfather, my father, and myself, and they were happy to have their interest confided to one of the family. I observed that I had a very early and long acquaintance with the spool-cotton thread through my grandfather and my father, having copied invoices for them in 1821; this was in 1854. I said I had some business which called me to France, Belgium, and Prussia which would take some little time, and they might think over it; they took me through the mills and I stated that I would be back in Glasgow again. I was in Paisley several times, and was warmly received and entertained by the Coats, old James and his wife, the father and mother of the whole family, and by other members, Sir Peter, his brother Thomas, at their respective residences, and at an entertainment at Sir Peter's, the grandfather of James of Pawtucket, and James of Pawtucket; Sir Peter and his brother Thomas, having to attend a meeting that evening to receive and examine their representatives in Parliament, begged I would excuse them for an hour or two, while young James and old James and I would descend to the basement to play a game of billiards; they also took me through their thread mills; at the same time Mr. Fairchild, of New York, was there, in consequence of the death of Hamilton McCall, to solicit a continuation of the business in favor of the successors of the firm; having attended to business in Lon-
679 don, Paris, Belgium, Liege, and Aix-la-Chapelle, I was then in Glasgow previous to my return to the United States, and the arrangements were completed, and they prepared a consignment for the spring of 1855, and so continued till 1874, when I retired in consequence of ill health.

(Objected to as irresponsive after the first sentence.)

104 Q. Did all that you have narrated in the last answer occur in 1854?

A. Yes; it all occurred in 1854, in the months from September to January.

105 Q. Your entertainments by the Coats people occurred, then, before you commenced selling the Orrs & Macnaught thread in this country?

A. Yes.

106 Q. Have you ever been entertained since by any of the Coats people?

A. Yes; decidedly; by Andrew Coats at Andalusia. I have mentioned that; that was since.

107 Q. When was that?

A. A year or two after that. It was after Andrew Coats had returned from his second wedding trip to Paris. He entertained me one entire night showing me the purchases they had made there—books, pictures, and engravings, etc. It was about 1856. Three or four years ago Sir Peter Coats and his daughter were here. He was here at the anniversary of the St. Andrew's Society, and I met him there and called to see him at the Buckingham. Andrew Coats was here about three years ago and called to see me at my residence.

108 Q. In what way have you ever entertained any of the Coats family in New York?

A. Meals and bedding; entertainment at my father's house. I don't know in what other way.

109 Q. When was that?

A. I can't recollect the exact date; before Andrew was married. He was married twice. It would be about the year 1840 or 1841.

680 There is another of the Coats I have often entertained here, the doctor—Doctor David Coats. The doctor died here. The doctor and Andrew lived together here in New York for a year or so.

110 Q. The doctor was not a member of the firm of J. & P. Coats, was he?

A. I was informed positively that the doctor, if he was not a partner, was a recipient of their bounty. He was allowed something. The doctor was about making an arrangement with some manufacturer to put his name, David Coats, on thread, and they thought it best to give him an allowance. I understood they did so; they pensioned him.

111 Q. The doctor then threatened the family that he would injure their business by putting his name of Coats on some rival thread, and they bought him off with a pension to prevent it. Is that as you understand it?

A. That is the general impression as the public understood it and as I also.

112 Q. Can you mention any other instances when you have entertained any of the Coats family?

A. I don't see how it was possible; they were on the other side. Those that were here I entertained; those that were abroad I couldn't entertain.

113 Q. In answer to 69 Q. you spoke of the second agent of the Coats people having been obtained "at my suggestion to Mr. Coats." When was it that you made this suggestion?

A. Let me remark. There seems to be a misunderstanding; that second agent was not really the agent of J. & P. Coats. I should consider not; they were the agents of Bates & Coats, of Philadelphia. It was contrary to the wishes of Auchincloss that another New York agent should be appointed, but Andrew Coats insisted upon it; it was for the financial convenience of Bates & Coats, in order to facilitate advancement on consignments—financial facilities.

114 Q. When was it that this second agent, or agent of Bates & Coats, was appointed?

681 A. Somewhere from 1848 to 1852, I should say. He was the second agent of J. & P. Coats' thread in New York. He was the agent of Bates & Coats, of Philadelphia, for J. & P. Coats' thread in New York.

115 Q. Andrew Coats, of the firm of Bates & Coats, was not a member of the firm of J. & P. Coats, was he?

A. I cannot say.

116 Q. What is your understanding?

A. I have none whatever except that their spools indicate, viz., that he was their agent for the United States.

Adjourned to Nov. 13, 1886.

NEW YORK, *Nov.* 18, 1886—11 a. m.

Met pursuant to adjournment.
Present: Counsel as before.
Adjourned to November 23, 1886.

NEW YORK, *Nov.* 23, 1886—11 a. m.

Met pursuant to adjournment.
Present: Counsel as before.

Continuation of cross-examination of ALEXANDER KNOX:

117 X Q. What has been your last business prior to taking the Orrs & Macnaught agency?

A. There were two branches in which I was engaged—the one was the one-third ownership of a patent for revolving fire-
682 arms, with an agreement with the manufacturers of said arms by which they were to manufacture the arms at certain specified prices, and I would be entitled to one-third of the advance or difference between the cost and the selling prices; the other branch of business in which I was engaged for about four and a half years, from 1849 to 1853, was that of an inspector of the customs at the port of New York under Hugh Maxwell, then collector, a similar position to that held as clerk under the same collector by James Auchincloss, the uncle of John and Hugh Auchincloss, as a liquidating clerk.

118 X Q. Who were the manufacturers of fire-arms referred to?

A. Sprague & Marston.

119 X Q. And how long had you been connected with them in the fire-arm business?

A. About the same length of time, from 1849 to 1854. My connection with them did not involve a copartnership in the manufacture or any loss of my time in that enterprise. They were tenants of my father in his old mill, corner of Washington and Jane, and made the proposition to me that for the amount of two thousand dollars, in cash paid, they would convey one-third of the patent and convey the share of profits stated to me, and by a separate agreement manufacture and continue to periodically divide with me the profits as previously stated. I might add that another person of the name of Robert Knox, no relation, however,

became interested with them in a manufacture of fire-arms under the name of Marston & Knox, I think, and thus erroneously, of course, I was supposed by some to be the Knox embraced in that firm, and inasmuch as this idea prevailed among some of the politicians of the ninth ward and the collectorship had been changed to an opposite political party, anxious to receive office for their friends, I received my congé from the custom-house department, and my father having died in the meantime in December,
683 1851, I had matters of settling up his estate to attend to. These matters called me abroad.

(Objected to as irresponsive after first sentence.)

120 X Q. Was the fire-arms enterprise a successful one?

A. To me quite successful for a time. Circumstances arose over which I had no control. It was the formation of a breech-loading fire-arms manufacturing company with Sprague & Marston and several gentlemen of Newark, New Jersey, in which I was not consulted. This company became a corporation with officers, but their attention was directed to the manufacture of breech-loading arms, shotguns, and rifles, and thus made a proposition to me to accept a certain amount of shares of stock of the new company and some cash in consideration of their not continuing to manufacture the revolving arms and the amount of money then due me for my share of profits in the previous manufacture.

121 X Q. What were your duties as inspector of customs?

A. Chiefly discharging cargoes, making returns, and such other duties as the collector might indicate; special duty, sometimes.

122 X Q. What was your salary?

A. The salaries were three dollars a day—ten hundred and ninety-five dollars per annum. They were paid monthly.

123 X Q. What was your business next before becoming an inspector of customs in 1849?

A. Superintending manager and chief clerk of my father's mill—cotton mill—from the year 1842 to 1849.

124 X Q. What had the fact that some one of your name was engaged in the fire-arm business to do with your discharge from the custom-house?

A. The same fact that prevented A. T. Stewart from becoming Secretary of the Treasury of the United States when General Grant wished to appoint him, and that was the law preventing a
684 person from carrying on any other business while holding an office in the Treasury Department. The custom-house was a branch of the Treasury Department.

125 X Q. What goods were made at your father's mill between 1842 and 1849?

A. Chiefly colored goods; various kinds; ginghams, etc.

126 X Q. Loom-made goods?

A. Loom-made goods; by hand and by power.

127 X Q. Anything else?

A. No; I can't say anything else. In former years a number of things were made.

128 X Q. Now, state in order the different kinds of business you had been in prior to 1842 and the nature of your employment in each.

A. Commencing in Philadelphia in hand-loom manufacture of colored goods and then in New York in the winter of 1817 weaving white goods—millinette; in 1818 needle cloth, white and blue twill, the first order for which was received from our then neighbor to the amount of 1,000 yards, the late Captain William M. Johnson, formerly a branch pilot at the mouth of the Mississippi and at the time spoken of a partner of Mr. Bradish, a sugar planter in Louisiana, below New Orleans. This was at Fitz-Roy road, near Southampton road, a part of the estate of the late Governor George Clinton, which my father subsequently bought from Nicoll Floyd and Richard Varrick, guardians of the then infant George W. Clinton, long since deceased. This locality was where Fifteenth street now passes through the premises. The commissioners were opening the street and awarded a sum for damages sustained from the ground that was taken and the removal of the house from the street. The fabrics became highly varied—millinettes, mosquito netting, foundation muslin, apron and other checks, such as bed-ticking checks. We continued till 1827 or 1828, when we removed to an estate purchased by my father in 1823, situated on Greenwich road,
685 now Greenwich street, and Jane street, subsequently opened through said property and extending to high-water mark on the Hudson river, having received from the corporation of the city of New York a water grant extending along said high-water mark partially, not wholly, to an exterior street across Washington street and around to a street, now called West street, where we built on the same West street a bulkhead with a return bulkhead extending through the center of Jane street at high-water mark. The water grant obtained by my father was subject to two rates of rent—up to 1844 one rate, and then the final rate, but which my father commuted in 1837 with the corporation by paying a sum which at 5 per cent. produced the latter highest rate. Subsequently, when the corporation had given a grant on the north adjoining the grant to my father, my father commenced an action in chancery against the corporation, employing the late George Brinckerhoff and the late George Wood as his solicitors (that was for the alleged water front of the late William Bayard estate, and was given to the late William Bayard, Jr., and the late Francis B. Cutting), for having included in their grant a water front belonging to my father on the north of Jane street adjoining the grant. In the course of time they had it marked out and filled in, and wishing to bring their lands into market Frank B. Cutting, in order to obtain access to Jane street on the north line for about 379 feet and 50 feet and some inches on Greenwich road, proposed to my father to purchase that piece of land to complete their blocks, and offered ten thousand dollars in order to withdraw the suit in chancery. My father asked twelve and Thomas Cummings, a contractor of this city, coming along at that time and being asked his opinion, recommended a compromise at eleven thousand dollars. Cutting drew up the agreement to pay that amount of

money, the said agreement being drawn in October, 1834, or 1835.
This enabled them to have their maps of lots sold at auction
686 to be prepared the next February, from which sale they realized about one hundred and sixty-five thousand dollars profit. In all this matter I was individually much employed making arrangements. I corresponded with Count de Survillier, Joseph Bonaparte, ex-King of Spain, who held claims against the Bayard estate. I was called upon once or twice by citizen Jeannette, who married Miss Clinton, and was interested in the Clinton farm, north of the Bayard estate and south of Fort Gansevoort, and who desired to go on with the improvements, the docking and filling in at the same time, to save expense. I understood also that the Shemille Pennocks, merchants or bankers in Amsterdam, held judgments against the Bayard estate. The widow Bayard held a dower right, and I was present at the old exchange, now the custom-house, where an auction sale took place to satisfy the judgments of the Shemille Pennocks, and the whole estate in bulk, I think, was sold for twenty-six thousand at that time under the management, I think, of a Thomas Taylor, a real-estate agent for the Bayards. That brings me down to 1835 in these matters. I was engaged also from 1827 to 1836 in attending to some shipping business, my father having purchased the ship "Camillus" in 1827, and in 1833 or 1834 the packet ship "New York," and in 1835 or 1836 the ship "Warsaw," and in 1841, I think, the ship "Oglethorpe," and in 1841 I think I bought the ship "Superior." In the meantime, in the winter of 1835 and spring of 1836, being troubled with vertigo in the head, my father said, "You have been very busy for twenty years now, and I apprehend financial disasters in the United States within a year from overtrading. I think I'll begin to attend to the business, and I don't want to extend or increase it, and you better go abroad for a year for observation and improvement." He conveyed to me the Fifteenth-street property about the same time as old John
Jacob Astor conveyed to his son, William B, the Astor
687 house property, the said legal conveyance being drawn by Augustus Floyd, the son of Nicoll Floyd, formerly mentioned. On the 16th of April, 1836, I embarked in the packet ship "North America" for Liverpool. An inventory of my father's possessions being made, they amounted to about one hundred and sixty-eight thousand dollars. I spent about six months traveling in the British isles, regaining my health, gaining in six months twenty-eight pounds. I then crossed the continent, spent a short time in Paris, descended the Rhone to Marseilles, thence to Genoa, thence to Leghorn, thence to Pisa, thence to Florence, thence to Rome, where I spent two months; thence to Naples, where I spent one month. I embarked thence in company with John Warren, of Boston, on a trip to the east, up the Mediterranean to Smyrna, where I found a plague existing very badly, as it had been for the previous twenty-two years. We had projected a trip to Egypt, but John Warren got fearful and took the first vessel for Boston. I remained in Smyrna from May to August, saw the commencement of the first French steamer to Constantinople, and went up in one to Constan-

tinople. During my residence in Smyrna I heard of the disasters which had been predicted by my father and embarked from Constantinople in a brig for London. We had a long passage, finally got out the Straits of Gibraltar, and reached London in company with the only other passenger, named Kirk. We had to go in quarantine at Sheerness for a limited time, about two weeks.

I remained in London some time, and my father and mother came out to the coronation of the queen. We spent some time there. We had two ships belonging to my father in Liverpool at the time, the "New York" and the "Warsaw." We came home in the "New York." We had a long passage.

While in Scotland propositions were made to embark in
688 business, in the importation of dry goods and a general shipping and commission business. This lasted from 1838 to 1842.

Adjourned for luncheon.

129 X Q. Before you took the Orrs & Macnaught agency, had you yourself ever bought, sold, or dealt in spool cotton?

A. I had copied invoices of John Clark, Jr., & Co., of Mile End, in 1821, 1822, and 1823, and in the capacity of clerk to my father had aided in the operations with the J. & J. Clark thread.

130 X Q. Is that all you ever did prior to the taking of the Orrs & Macnaught agency?

A. As far as I recollect.

131 X Q. What was the John Clark, Jr., of Mile-end thread imported for in 1821 or 1822, as you say?

A. Imported for sale.

132 X Q. Who imported it at that time?

A. It was consignments by a house in Glasgow to Finley & Nelson, of Glasgow, William Nelson having come out with the first shipment, in company with my grandfather, in 1821, and, as I understood, he was a relative of our family and became a guest at our house, my father being then in business and pretty well acquainted with the dry-goods dealers in New York. He introduced said Nelson to said dealers. He was the bondsman at the custom-house for the said Nelson. When Nelson left New York for Charleston to purchase cotton he left the stock in my father's possession, with power to sell and negotiate for all descriptions of goods embraced in said shipments, such as book and mull muslins, nainsooks, embroideries, madras, and mouselepatam handkerchiefs, and ginghams, etc., etc. He got a room in Pearl street, nearly opposite Cedar, which street was not then opened. Cushman & Falconer kept the first floor in said building.

133 X Q. How much of the John Clark, Jr., & Co. thread do you remember having been imported in 1821, 1822, or 1823?

689 A. I can't tell; I have no recollection of the quantity. I was a lad then.

134 X Q. Do you remember more than one invoice?

A. I do.

135 X Q. How many do you remember?

A. I can't say.

136 X Q. Why not?

A. I didn't impress my memory with the quantity. There was my grandfather, who became an inmate of our family; there was William Nelson, Sr., there was William Nelson, Jr., and his wife, he being a packing-box maker; all became inmates of our family, which consisted of my father and mother and myself. In the meantime I was attending school during school hours and writing and industriously working as an assistant to my father and Nelson; also sometimes till 10 o'clock and midnight at other times.

137 X Q. Did you yourself ever have anything to do with selling this thread of John Clark, Jr.?

A. As an assistant, now and then I had, as in other cases when Hugh Auchincloss, the second, came up to my father's with orders from dry-goods men in Hanover square and Pearl street, when I acted as clerk and took the orders and delivered the goods.

138 X Q. Do you remember particularly ever having taken any orders for or delivered any of this John Clark, Jr., thread, or do you merely remember generally that you sometimes sold goods of some kind out of Nelson's stock?

A. Generally.

139 X Q. Not particularly?

A. Not particularly.

140 X Q. The Nelson stock consisted of a great variety of goods, did it not?

A. Not a great variety; no, sir; a small variety, I should say.

141 X Q. Was your grandfather interested in these Nelson shipments?

A. I don't know what you mean by interested.

142 X Q. I mean pecuniarily.

690 A. I cannot tell, certainly.

143 X Q. Do you remember particularly whether, when Nelson left for Charleston, he left any of the thread in his stock?

A. I cannot say particularly.

144 X Q. Now, tell me what you had to do with what you call the operations with the J. & J. Clark thread.

A. What I did was clerical; I did most of my father's writing from an early age. When there was writing to be done I was his amanuensis.

145 X Q. Do you remember what you did do in a clerical way in relation to that thread?

A. I do.

146 X Q. What?

A. In 1822, when Wm. Nelson had returned or was returning from Charleston to Glasgow, his partner, Mr. Finley, in Glasgow, knowing of the proposed return of Mr. Nelson, proposed to a nephew, Peter Nelson, who had been unfortunate in manufacturing in Glasgow, to come to New York and be agent in New York for Finley & Nelson, of Glasgow, he not knowing the arrangements made in New York by his partner with Alexander Knox, my father. He arrived here during the summer of 1822 with his wife and family,

while the city was deserted, all below Chambers street being fenced off because of the yellow fever. This fence was put up during the latter part of July and continued until November.

In the meantime Greenwich village and the region on the bank of the river and up to Broadway, where 19th street is now, and various intervening streets were occupied by sheds, two banks being in West 11th street—which was Hammond street then—the Bank of New York and the City bank. Peter Nelson and family found lodgings and board on the Hudson river side, between the great Kiln road, for nine weeks. He told my father for what purpose he had come to the city, and my father said all right; I must
691 retain the goods in my possession until I am reimbursed for the duties for which I am bondsman. The shipments as they may now arrive you may receive. Matters went on till the following season, 1823. Mr. Peter Nelson appeared to be an extravagant fellow; took a residence on the battery for the winter and a summer residence on Long Island somewhere for the summer. He seemed to neglect his business and forget to make remittances. The merchants who had purchased Clark Mile-end thread through my father from old Nelson said, "What a peculiar man this is—this Peter Nelson. We can't get him to supply our orders. He is neglecting business. Cannot you help us in this matter by sending out orders for the thread?" In that way they induced my father to send the exchange for five hundred pounds sterling to be filled in cotton thread, as alluded to in some former part of my examination. In addition to this, old Nelson in Glasgow—William—alarmed at the non-receipt of the remittances and naturally anxious, came out again to straighten matters. He made a settlement with his nephew and took possession of the goods he had on hand. Being an officer of the church in Glasgow of the same denomination as one in this city, of which William Whiteright, Sr., was an officer here, and Whiteright, Sr., being a retailer on Broadway between Duane and Worth streets, and William Nelson having left his son and daughter-in-law here when he first went to Charleston, which son proved to be rather a worthless and indolent fellow, said son came to my father and said that his father told him whenever he was in want of funds to come to Alexander Knox and get them. Such was the representation of the young Nelson to my father, and by such representation he obtained some assistance from my father, which his father afterwards utterly repudiated; and when it became necessary, from the removal of Peter Nelson from the agency, some person being necessary as agent, and old Nelson being rather piqued at 500 pounds sterling being sent to Glasgow to be filled in
692 spool cotton, and when it became necessary for him, the senior Nelson, to return to Glasgow, asked William Whiteright to become his agent here, and the Clark Mile-end having quoted to my father that he was under obligations for twenty years to consign his spool cotton for the United States to but one house in Glasgow, who had loaned him, I understood, ten thousand pounds to place him in a comfortable position in manufacturing, and asking my father what should be done with the money, my father,

having had here a brother of the Clarks of Paisley in his employment and knowing J. & J. Clark, of Paisley, requested the Mile-end Clark to hand the money to J. & J. Clark, of Paisley, to be supplied in their thread. In this enterprise a gentleman named John Leonard, a man-milliner highly respected and respectable, afterwards president of the Mechanics' bank, became financially interested with my father in that enterprise. The thread arrived here, was sold to several merchants, and the adventure was continued for four years, until my father's increasing private and personal business and the profits on these importations diminishing induced him to abandon further action. Now, in all these transactions I had a clerical interest and did a good deal of work.

(Objected to as incompetent because largely founded upon hearsay and as largely irresponsive.)

147 X Q. How much of the J. & J. Clark thread did your father and his associate import, if you know?

A. For these statistics I must refer you to the custom-house records.

148 X Q. You mean that you do not know?

A. I do. I did know; I do not now.

149 X Q. Can't you give any idea of the amount?

A. No idea at this time.

150 X Q. Can you give any idea of the amount of importations of the John Clark, Jr., thread?

A. I do not. I refer you for these statistics to the custom-
693 house records. I do know this, that the first of J. & P. Coats' spool cotton brought here by James Coats the second—I think he informed me; at least one of the Coats—that Hugh Auchincloss & Sons would not pay the duties, knowing the hazardous nature of introducing new and unknown brands of spool cotton. He actually had to borrow the money; it was so very hazardous. It took so long to obtain any hold on the public favor. It took a long period to abandon the use of ball cotton and establish a favorite brand of spool cotton.

(Statement about Mr. Auchincloss objected to as incompetent and irresponsive.)

151 X Q. Did ball cotton continue to be largely used in this country between 1820 and 1830 and between 1830 and 1840?

A. Between 1820 and 1830 it did; between 1830 and 1840 I cannot say; it was gradually giving way to spool cotton. In oriental countries it is still used, and I am informed that Orrs & Macnaught and R. F. & J. Alexander are the favorite ball thread in those countries. Thomas Russell told me—I think it was Thomas Russell—for a time his friends, the Mile-end Clarks, had made ball cotton, but had either surrendered or given it up, Orrs & Macnaught's and the Alexanders having the lead and being, as I understand it, the chief manufacturers in Scotland of that article.

152 X Q. Was it your father's experience with John Clark, Jr.,

and J. & J. Clark threads that the business of attempting to introduce them was a very hazardous and unsatisfactory one?

A. I think not.

153 X Q. He gave it up, didn't he?

A. His increasing business, as I mentioned before, induced him to abandon this. I am pleased to add, I speak facts, I don't dwell on theories or imagination, I speak what I believe and know; I can't answer for my father's or for any dead men's acts.

154 X Q. I understood you to say that one reason why
694 your father gave up the attempt to introduce the cotton was the unsatisfactory state of the profit. Am I correct?

A. I wish to say here that my father never made an attempt to introduce spool cotton. These introductions of spool cotton were for special orders that he had to supply special dealers who, not being able to obtain the Mile end, desired him to obtain the Seed Hill spool cotton, which was the J. & J. Clark thread or some other spool thread, the article spool thread being then a novelty in the market.

155 X Q. And your father gave up after three or four years, even the filling of these special orders, owing to the unsatisfactory condition of the profits, did he not?

A. This "giving up" is an expression which both my father and myself despised. He discontinued, and I have repeatedly stated that he discontinued on account of a better paying business of his own. That expresses it.

156 X Q. Isn't it true that your father discontinued this business because the profits were so small that it wasn't worth while to continue it?

A. I have given you two causes. There is no necessity of repeating. These two causes are, in my judgment, the causes; that is all I have to say. Emphasize "the causes" and "in my judgment."

157 X Q. Was your father's business that of a manufacturer of loom-made goods during the period when he engaged in those spool-cotton enterprises?

A. It was.

158 X Q. Did he keep any store apart from his mill?

A. He did.

159 X Q. Did he sell any other goods at his store besides those of his own manufacture?

A. His store was a warehouse, dividing, as it were, his stock from his manufactory and his warehouse. He did not always keep a separate store, but he did keep a warehouse at No. 2 Gold street at one time, and 54 Cedar street at another, and 85 Jane street
695 at a third, and at Fitzroy road at a fourth. This was for the purpose of dividing his stock, raw and manufactured.

(Objected to as irresponsive.)

160 X Q. You have not answered the question. Please hear it read again and answer it.

A. He did not, excepting very seldom. I recollect certain winters in which he had from Vermont, where he had an uncle residing, shipments of butter and cheese; occasionally the balance of their

stock when returning home from the city, after residing here some weeks, which merchandise he would dispose of to his friends and other buyers, strangers.

161 X Q. Where did your duties call you, at the factory or the warehouse?

A. Either one or the other whenever there was anything to be done.

162 X Q. Was that so between 1823 and 1828?

A. It was.

Adjourned to Nov. 29th, 1886.

NEW YORK, *Nov. 29th*, 1886—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of cross-examination of ALEXANDER KNOX:

163 X Q. When you first took the agency of the Orrs & Macnaught thread what were the numbers of the thread which they sent to you?

A. I think they were 8 to 100 or 1 to 16 with us; it might have been 8 to 150; I could not say positively. That would be 1 to 21. There were cases of assorted numbers.

164 X Q. I understand you to say that all the numbers from 8 to 45 were six-cord thread at first and all the numbers above No. 45 were not six-cord at first. Is that correct?

696

A. That was so.

165 X Q. Of how many cords were the numbers above 45 made?

A. As near as I recollect, 50 and 60 were four-cord, and up to 150 three-cord; 200 two-cord, I think. There was no number between 150 and 200.

166 X Q. Now, do I understand that subsequently Messrs. Orrs & Macnaught made their Nos. 50 and 60 of six-cord thread?

A. Subsequently they did and at my suggestion.

167 X Q. Did they ever make any change in the number of cords in numbers higher than 60?

A. They made, at my suggestion, two changes in 70 and 80, making those four-cord.

168 X Q. Those were the only changes, were they?

A. No; they had changed without my knowledge, but at the suggestion of George A. Clark, as I understood, the 60 again to four-cord, but changed back immediately on receiving expressions of my dissatisfaction.

169 X Q. Have you now mentioned all of the changes in the number of cords that were made during your agency?

A. I think so.

170 X Q. State, as nearly as you can, the year when Orrs & Macnaught first changed their Nos. 50 and 60 from four-cord to six-cord.

A. I cannot state exactly; the year has entirely escaped my recollection.

171 X Q. Could you state whether it was before or after 1865?

A. I think it was before, decidedly.

172 X Q. State, as nearly as you can, the year when Orrs & Macnaught temporarily changed their No. 60 back to four-cord.

A. I cannot state that with precision or accurately as to the time.

173 X Q. Could you state the time within five years?

697 A. I think it must have been; I really couldn't state positively, but it was about the time when George A. Clark was just on the eve of introducing his O. N. T. thread; I had removed from 5 Pine street to 542 Pearl street, both localities being about five doors east of Broadway, and I recollect George A. Clark called to see me in my new quarters and introduced the conversation regarding the change in the number of cords of No. 60.

174 X Q. Well, can't you fix that time within five years of the correct date?

A. I think I can; I think I was at 5 Pine street in 1862 and at 541 Pearl street in 1863; that is my impression or memory.

175 X Q. And do you think it was in 1863 that this event happened?

A. I think it was.

176 X Q. About how soon afterwards did Orrs & Macnaught change back again to six-cord in their No. 60?

A. I think immediately.

177 X Q. And they never went higher than No. 60 in six-cord, did they?

A. Not that I am aware of.

178 X Q. And when did they first commence to make Nos. 70 and 80 of four-cord?

A. About the same time they commenced to make the 60 of six-cord.

179 X Q. Did Orrs & Macnaught, during the period of your agency, ever make any changes in the style, decoration, lettering, or color of their labels?

A. They did.

180 X Q. Please describe the style, color, and lettering used on both ends of the spools contained in the first shipment to you.

A. Black and gold label on one end with the number in the center, and a white and black label on the reverse end with the number also at about the center—in the center I would say; that first shipment was upon oak spools of a reddish color, and the wood of the spools was somewhat larger than some other threads.

698 181 X Q. Please state what the lettering was upon the black and gold labels of that first shipment and how such lettering was arranged on the label, if you remember.

A. "Orrs & Macnaught, best six-cord, 200 yards;" the "Orrs & Macnanght" in an outer circle; I think "best six-cord" in an inner circle; I don't remember whether the "200 yards" was in a circle or in a line across; I can't say positively.

182 X Q. Were the labels on all the different numbers alike except in respect to the number?

A. I think they were.

183 X Q. They all said "best six-cord" whether the thread was six-cord or not, did they?

A. I think so.

184 X Q. Did it occur to you that that statement on the labels was a fraud upon the public?

(Objected to as immaterial.)

A. It never did.

185 X Q. Do you now think it was a fraud?

A. I cannot say; it was a custom, so far as I know, practiced by all manufacturers of threads with which I was acquainted at the time; I never knew the question mooted until some years after in a case which was tried at a court in Boston, Mass., in which Geo. H. Stewart, of Philadelphia, and a young clerk of Boston were opposing parties; I don't know which was the plaintiff and which the defendant.

186 X Q. In what year was it that this case was tried?

A. I couldn't positively say the year.

187 X Q. Was it after you retired from your agency of the Orrs & Macnaught thread?

A. No, sir; it was about the full tide, the middle of my agency, I think.

188 X Q. Then you knew, about the middle of your agency, that the question had been raised whether it was a fraud or not to use labels bearing the words "best six-cord" on spools of thread which were not in fact six-cord?

699 A. I know no further than by hearsay. George Stewart himself informed me of the suit in Boston.

189 X Q. And you still continued to sell the thread with the label bearing those words on spools of thread which were not in fact six-cord?

A. I sold the thread sent to me for sale the same as Auchincloss did that of Coats, and Clark did that of the three Clarks, the Glasgow, Paisley, and Newark threads. The buyers or dealers, so far as I recollect, never called it in question. I have no recollection of their ever using the expression to me of a fraud upon the public in that regard.

190 X Q. And you didn't think it was a fraud, did you?

A. I never allowed my mind to decide upon the question at all, because the idea never occurred to me. It was the universal practice, as far as I know, even by the strictest and most religious officers or elders of the church, such as Hugh Auchincloss, Sr., and you might say Sir Peter Coats, the manufacturer, knighted by her majesty Victoria the First of Great Britain.

(Answer objected to as incompetent so far as it purports to state wording of labels not produced and as irresponsive.)

191 X Q. Please look at the spools of Orrs & Macnaught thread Nos. 70 and 80, which I now take from the second row of Defendant's Exhibit No. 48, Chronological Exhibit of Thread Manufact-

urers, and tell me of how many cords the thread on each of those spools is made.

A. Four cords.

192 X Q. The labels on each of said spools say six-cord, does it not?

A. It does, and so does Coats' No. 80.

193 X Q. Please to look at Coats' No. 70 and 80 and say if the Coats thread is not actually six-cord.

A. The thread I am now looking at appears to be six-cord No. 70, but I have been conversing about a thread of 20 years
700 ago. This thread I am now looking at I suppose is of much more recent date. This 80 I am now looking at of Coats appears to be six-cord. But I would remark that the leading manufacturers before my retirement announced to the public that their thread was six-cord from 8 to 100, a vast change in the manufacture of thread. I never recommended Orrs & Macnaught to follow up the steps in advance made by the leaders in this last increase of strands or cords. I feel quite sure that if you produce the threads of the last-named leading manufacturers manufactured between 1860 and 1866 you would find they were not six-cord in those Nos. 70 and 80 to 100.

(Last part of answer objected to as irresponsive.)

194 X Q. Please to look at Coats' Nos. 110 and upwards from the first row of Defendants' Exhibit No. 48 and tell me whether the labels say that the thread is six-cord.

A. 110 does not say it. It says "best spool cotton." 120 says "best spool cotton," and is three-cord. 130 says "best spool cotton." 150 says "best spool cotton," and appears to be two-cord. 200 appears to be two-cord, and says "best spool cotton." The threads manufactured, say, from 1860 to 1870; the Orrs & Macnaught or J. & P. Coats or either of the Clarks, were not the same as those produced within the last two or three years.

(Last part of answer objected to as irresponsive.)

195 X Q. Will you please point out, if you can, in Defendants' Exhibit No. 48, Chronological Exhibit of Thread Manufacturers, a single spool of any manufacturer except your own, Orrs & Macnaught thread, the label of which bears the incorrect statement "six-cord" when the thread on the spool is not in fact six-cord?

A. In regard to that I would state what I have stated be-
701 fore, that I have not known any importation of Orrs & Macnaught thread into this country for the last twelve years; that at the time it was imported by me as agent; the spools of the other imported threads contained the same announcement that Orrs & Macnaught's did.

(Answer objected to as irresponsive and question repeated.

Defendants' counsel states that he wishes to have it noted upon the record that the witness commenced to examine the numerous spools of thread in the exhibit, and finding it would take a long

time to enable him to answer the question made some remark to that effect to complainants' counsel and was told that he could have all the time he wanted, or words to that effect.)

196 X Q. Question repeated.

A. It requires considerable time to examine every spool in the exhibit. At the time the goods were manufactured they were the same. I think I might state here that my answer, which was pronounced irresponsive and therefore objected to, was against the comparison of threads manufactured at periods of twelve years anterior to others—well, you might say twelve to twenty. I don't know when these spools were picked up, but I know that none, to my knowledge, have been imported for the past twelve years.

(Answer objected to as irresponsive and question again repeated.)

197 X Q. Question repeated.

A. I have not yet undertaken to examine every spool in that exhibit. I have examined some. I am fully satisfied in my own mind that if you were to compare contemporaneous productions you would find no material difference in the assertion made that alludes to the fact, the declaration, the announcement on the spool of "best six-cord." I am quite satisfied in my own mind
702 that the declarations of labels were similar to that now announced as fraudulent. The public seemed to have been satisfied with my thread, and I might have had it to the present time had my health permitted.

(Answer objected to as irresponsive, and also as incompetent in so far as the witness volunteers statements as to the contents or what he is satisfied was the contents of labels not produced.)

198 X Q. Do you decline to answer the question more responsively?

A. I do, because I cannot.

199 X Q. Have you been able to find any label except your own, Orrs & Macnaught, in Defendants' Exhibit No. 48 which represents that the thread on the spool is six-cord when it is not in fact six-cord?

A. I have not yet found any.

(The witness makes a further examination.)

A. (Con.) I have not the slightest idea of finding in this case at this time a single instance such as I am asked to produce if I can, because the articles exhibited in that case are so isolated in their period of production and, in my judgment, ought not to be compared with each other. I need not hope to find it in that exhibit, because the Orrs & Macnaught compared with any others in that box are so isolated in their periods of production with the other kinds exhibited; but, as I before repeatedly stated, the great advancing change in the qualities of thread has increased more in the last fifteen years than in the previous fifty-five.

(Last part of answer objected to as irresponsive.)

Adjourned for lunch.

200 X Q. In one or two of your previous answers you
703 have intimated that the spools of Orrs & Macnaught thread contained in Defendants' Exhibit No. 48 were made ten or twelve years anterior to the other spools in the said exhibit box. Do you know that that is a fact, or do you merely draw upon your imagination?

A. I presume it to be a fact from the circumstance that no Orrs & Macnaught have been imported during the past twelve years, perhaps thirteen; whereas the collection of the exhibit, I am told, has been made during the past year.

201 X Q. For anything you know to the contrary, the spools of the other manufacturers contained in the box Defendants' Exhibit No. 48 may be ten or twelve years old; is not that so?

A. It may be so, though not likely in my opinion.

202 X Q. You are not able to say that it is not so, are you?

A. Not as a positive fact, nor that it is so.

203 X Q. And isn't it your opinion that some at least of the spools, other than the Orrs & Macnaught, as, for instance, the J. Clark & Co., A. T. Stewart thread spools, are at least ten or twelve years old?

A. That may be.

204 X Q. How long is it since you have known any J. Clark & Co. A. T. Stewart spools being imported?

A. I only know from hearsay; I did not recollect having seen any until I saw it in the exhibit.

205 X Q. And when was it that A. T. Stewart imported those spools that you spoke about in your direct examination, of which you said that that enterprise of Stewart failed?

A. I could not exactly say when it was.

206 X Q. About when?

A. I cannot say.

207 X Q. Wasn't it before 1865?

A. It might be about that time.

208 X Q. They have not been imported since, to your knowledge, have they?

A. I do not know when they have or when they have not, positively.

704 209 X Q. That enterprise of Stewart's did not last long, did it, but failed shortly?

A. I cannot fix the term "long" or "shortly;" I understood it was continued on this side, as I have previously stated, at Wappinger's Creek, New York State, near Mattawan.

210 X Q. Give your best recollection as to the time when the J. Clark & Co. spools ceased to be imported by A. T. Stewart.

A. I have no means of stating that with any accuracy.

211 X Q. The whole enterprise ceased some time before you retired from the Orrs & Macnaught agency, didn't it?

A. I understood it did.

212 X Q. Then, according to your information, these spools of J. Clark & Co. A. T. Stewart thread which are contained in the box

Defendants' Exhibit No. 48 must be at least twelve years old; is not that so?

A. Really it does not follow, because they may have been made here in the same manner as the Clark Mile-end thread is made here.

213 X Q. Have you any information that such was the fact?

A. I have not.

214 X Q. Then will you please answer 212 X Q.?

A. I say really I cannot say.

215 X Q. Do you mean to tell the court that that is your best information on the subject?

A. I do; it is all information; not personal knowledge.

216 X Q. I show you No. 80 of the J. Clark & Co. A. T. Stewart thread, Defendants' Exhibit No. 48, and ask you how many cords that is made of.

A. This appears to be made of six cords, but I doubt whether it is No. 80 in reality; it appears to be coarser; I should think from its appearance it was not finer than 60.

217 X Q. In your answer to 180 X Q. you said that the first shipment of the Orrs & Macnaught thread to you was upon oak
705 spools of a reddish color and somewhat larger than some others; how long did Orrs & Macnaught continue to use spools of that reddish color and larger size?

A. Red oak I should call that. I cannot say positively, but think probably three or four years.

218 X Q. Why did they alter the color and size of the spools after three or four years?

A. I suggested to them my impression that an acid exuded from the spool, injuring, in my opinion, the strength of the thread, and recommended they use white wood spools of a relatively smaller size and save somewhat in freight and weight and in the exudation of the acid that I supposed tended to weaken the strength of the thread on the oak spools. Another reason was that in comparing similar numbers of different threads the larger spools would produce an impression that corresponding numbers of the Orrs & Macnaught were coarser than corresponding numbers of some other threads.

219 X Q. In your answer to 180 X Q. you said that in the first shipment of Orrs & Macnaught thread the numerals were in the center of the black and gold label. How long did that arrangement of the numerals continue to be used?

A. About the same length of time—three or four years.

220 X Q. Did it ever occur to you that the Orrs & Macnaught spools having the black and gold label with the numeral in the center on one end and with a white label bearing your name as general agent on the other were strikingly similar to J. & P. Coats' spools and labels?

A. I don't know what you mean by "strikingly similar." They were similar to most other threads which I had seen, that being the usual method of marking threads.

221 X Q. Don't you think the white labels on one end of your

spool was a good deal more like white labels on Coats' spool than any other label you ever saw?

A. I cannot say that it was.

706 222 X Q. Won't you point out in Defendants' Exhibit No. 48, Chronological Exhibit of Thread Manufacturers, any spool which you think bears a label on the reverse end as much like the Coats label on the reverse end as yours does?

A. There is one referring to Defendants' Exhibit No. 22, J. & J. Clark No. 50 Thread. George Clark, general agent, I think, on the reverse.

223 X Q. Do you find any other spool of any other manufacture which so nearly resembles J. & P. Coats' said label as does yours?

A. I have not yet found any. I have not examined all the spools.

224 X Q. Please examine them all and answer.

A. I do not.

225 X Q. Do you think that any one would be likely to mistake the Orrs & Macnaught spools and labels for J. & P. Coats' spools and labels?

A. I do not think so.

226 X Q. In your experience of twenty years did you ever know of one being mistaken for the other?

A. Never to my knowledge.

227 X Q. Or hear of it?

A. Never.

228 X Q. Do you think that any one would be likely to mistake J. & J. Clark spools and labels, Defendants' Exhibit No. 22, for the J. & P. Coats spools and labels?

A. I do not.

229 X Q. Did you ever hear of any such mistake being made?

A. I have no recollection of ever hearing it.

230 X Q. I call your attention to the fact that in the second row of the Defendants' Exhibit No. 48 there are two spools of Orrs & Macnaught thread of the same No. 30, but with different labels; one has a large label on the head, nearly covering the top of the spool, with the name "Orrs & Macnaught, Glasgow;" the other label is smaller and omits the word "Glasgow;" on the reverse one

707 spool has a red and white label, the other a black and white label. Which is the older of those two styles of spool and label?

A. I cannot say.

231 X Q. Did you deal in spools with both kinds of labels shown on those specimens?

A. I have no doubt I did; I don't think I ever noticed it before.

232 X Q. Can't you remember which was the first style of label you used of the two?

A. I cannot.

233 X Q. I notice that one of the black and gold labels has the name in black on a gold ribbon; the other has the name in gold on a black circle. Does that difference recall to your recollection at all which was the earlier style?

A. It does not.

234 X Q. Can you tell at all when either style was introduced or how long used as distinguished from the other?

A. I cannot.

235 X Q. How long have you known J. & P. Coats' spool cotton?

A. Since it was first introduced, in 1840 or 1842.

236 X Q. Isn't it true that J. & P. Coats' spool cotton has for many years past been sold in this country to an extent or amount as large as that of all the other manufacturers of spool cotton put together?

A. I cannot say it is.

237 X Q. Isn't that your information?

A. I cannot say it is.

238 X Q. Hasn't J. & P. Coats' spool cotton the reputation of being sold to a larger extent in the United States than any other spool cotton?

A. I think so.

239 X Q. And that was its reputation when you were in the business, was it not?

A. I think so.

240 X Q. Can you tell me how early manufacturers made No. 50 thread of four-cord?

A. I cannot.

708 241 X Q. Did they make No. 50 four-cord as early as 1850?

A. I don't know.

242 X Q. Did any other manufacturer than Orrs & Macnaught make No. 50 four-cord as early as 1855?

A. I really couldn't say; I think Coats did.

243 X Q. Anybody else?

A. I think the Clarks, of Glasgow and of Paisley, did.

244 X Q. Please describe the labels on each end of spools of John Clark, Jr., of Mile End, which you say William Neilson imported between 1821 and 1823.

A. I cannot from memory report the exact label or labels.

245 X Q. Can't you remember either of them?

A. Neither of them; the thread was then sold by the package and not retailed by my family, and the label, as they then existed, made no impression upon my mind from which I could make a description; it was sixty-five years ago. The labels of the Mile-end thread have undergone various changes, and the numbers did not correspond with those of Coats', Clarks', or Orrs & Macnaught's—I mean, when I speak of Clarks, the Paisley Clarks.

246 X Q. Don't you remember anything about the arrangement of the lettering?

A. I do not.

247 X Q. Nor of the colors?

A. I recollect generally that the one end was a black and gold and the other a white and black.

248 X Q. But you can't be any more specific than that?

A. I cannot.

249 X Q. Can you be any more specific as to the label of the J. & J. Clark thread imported by your father between 1823 or 1824 and 1827 or 1828?

A. I recollect nothing in particular in regard to the lettering; I remember the general fact that it was a black and gold label
709 on one end and a white and black on the other. We did not retail the thread; it was sold by the shipment or by the package. We did not seek to establish an agency; it was solely adventurous. The dry-goods men desired to have spool cotton; they could not procure it in the quantities and at the times they wanted from Peter Neilson, and suggested to my father that he order it and supply them; he did so at the time mentioned and then discontinued.

250 X Q. And won't you admit, after reflection, that his reason for discontinuing it was that the sales and the demand for it were so trifling?

A. No; I cannot admit that. He said they might order it themselves if they wanted to; he had other business to attend to. There was a growing demand and a new agent had been appointed in place of Peter Neilson, namely, William Whitewright, Sr.

251 X Q. Didn't you make an affidavit about thirty years ago in a suit between the Mile-end Clark and the agent of J. & J. Clark, in which, speaking of this same transaction, you said:

"My father discontinued to sell J. & J. Clark & Co.'s cotton for about three years for the accommodation of particular houses with which he was dealing in other goods, and at the end of that time he abandoned it on account of the demand being so trifling"?

A. It may be.

252 X Q. And isn't that true?

A. I think so.

253 X Q. J. & J. Clark altered their label a number of times, did they not?

A. I don't know. I stated that John Clark, Jr., of Mile End, did. I have no doubt J. & J. Clark did also.

254 X Q. Didn't you know of their imitating the John Clark, Jr., label?

A. Personally I cannot say. There was a suit pending
710 between the Paisley and Glasgow Clarks regarding the label. The peculiar circumstances I cannot explain, because I never particularly learned them.

255 X Q. Didn't you make an affidavit in that suit?

A. I think it was in that suit, so I was informed. The lawyers were Gen. Stoughton, on Wall street, and Martins & Smith, of this city, for the other party. They were in the Bank of Commerce building. I think that was the firm.

256 X Q. About when was that suit?

A. I couldn't say except from the document you have; about thirty years ago, I suppose.

257 X Q. Didn't you make an affidavit in that suit in which you said:

"J. & J. Clark & Co. have changed their label frequently and

have had and now have different labels in this market at the same time on their six-cord white cotton "?

A. I have no recollection. If I said so I have no doubt it was correct.

258 X Q. Was not a specimen of the J. & J. Clark label shown to you at the time of that suit—30 years ago—and didn't you compare it with the John Clark, Jr., & Co. label, and didn't you say in regard to it:

"It's a very close imitation and could hardly be closer without prejudice to the object. I cannot distinguish between the two without particular examination and my eyesight is good. As a member of the trade, I pronounce the label of J. & J. Clark & Co., complained of by the plaintiffs, to be an imitation of the plaintiffs' label, contrary to the principles and practice of fair dealing established in the trade and calculated to deceive the public"?

A. I have no recollection of that whatever, except that the case did exist and I was a witness. I can say nothing in regard
711 to the testimony I then gave, because it has gone entirely out of my memory. I presume the record is correct as far as I know.

Adjourned to November 30, 1886.

NEW YORK, *Nov. 30th*, 1886.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of the cross-examination of ALEXANDER KNOX:

259 X Q. Did you know George Clark, who was the general agent at one time in the United States for Messrs. J. and J. Clark's spool cotton?

A. I cannot say that I personally knew George Clark. I knew George A. Clark; whether it was the same individual or not I cannot say. I recollect seeing a George Clark at the Seed Hill mills, in Paisley, in the year 1854; that, as far as I recollect, is the only time I saw him.

260 X Q. When did the George Clark that you knew become the general agent in the United States for J. & J. Clark?

A. Really, I couldn't say. I could not say either that I knew the George Clark, as I only saw him once, to my knowledge.

261 X Q. Was the one that you saw the agent for J. & J. Clark?

A. I do not know.

262 X Q. You were asked some questions yesterday in regard to some statements in an affidavit made by you some thirty years ago, upon which you did not appear to have much recollection.
712 Do you think your memory would be refreshed upon those subjects if you could read a copy of said affidavit?

(Question objected to by defendants' counsel, as it does not appear that any such affidavit has been made; second, as containing an unwarranted statement as to the character of the witness' testimony; third, as immaterial to any issue in this case.)

A. I cannot say. I think it possibly might.

263 X Q. Please look at the paper I now show you and say if you recognize that as a copy of your affidavit made in a suit between the Clark concerns on December 20th, 1856.

A. I have no doubt of it. I do not recognize it, however. I believe it to be a copy. I think that is the first time I have ever seen it in that form.

264 X Q. Do you recognize the Orrs & Macnaught labels pasted in the margin of said copy as the style of label used on the Orrs and Macnaught spool cotton at the date of said affidavit, December 20th, 1856?

A. I think I recognize it.

(The labels are marked for identification "Complainants' Exhibit First Orrs & Macnaught Labels.")

265 X Q. Are the labels which you have just identified the first style of label which you imported and the kind which were used upon the reddish-colored oak spools?

A. I think so.

266 X Q. Please look at the labels pasted in the margin of the paper shown you, just above the commencement of the copy of your said affidavit, and state if you recognize the upper one of those as the style of label then (in 1856) and previously used upon the J. Clark, Jr., & Co. Mile-end cotton.

A. I do.

267 X Q. How long previous to 1856 had you known that label used on all of the John Clark, Jr., Mile-end spool cotton?

713 A. I could not say how long previously.

268 X Q. I call your attention to the following statement in your said affidavit:

"John Clark, Jr., & Co. have exclusively used their present label in this market on their six-cord white cotton since about 1843, and it is universally known. They were the first in the trade to commence using black spools exclusively, and they have so exclusively used them on their said white cotton before and ever since 1843."

Is that statement true?

A. I have no doubt of it.

269 X Q. And was the label which you speak of in that statement the upper of the two labels just identified by you?

A. It was, to the best of my knowledge.

(Label referred to is marked for identification "Clark Mile-end old label.")

270 X Q. I notice on the label that you have identified as the Clark Mile-end label the name William Whitewright, agent. From what time was William Whitewright agent of Clark Mile-end thread?

A. From about 1824, as near as I can recollect.

271 X Q. Do you remember at all the character, arrangement, or colors of the Clark Mile-end label or labels which were in use prior to 1843?

A. Not very distinctly; I mean at the present time.

272 X Q. Can you say in what respects, if any, they differed from the sample marked "Clark Mile-end old label"?

A. I cannot say.

273 X Q. Would you undertake to speak positively as to any peculiarity of the Clark Mile-end labels used prior to 1843?

A. I would not at present.

274 X Q. Would you even undertake at present to speak
714 positively in regard to the color or colors of the Clark Mile-end labels which were used prior to 1843?

A. As far as my memory extends, the general outline of the label was similar, though not identical in details.

275 X Q. Do you mean similar to the label adopted in 1843 and marked "Clark Mile-end old label"?

A. I mean that label of which we have been speaking so much; that very label.

276 X Q. You can't be any more definite as to the old labels used prior to 1843 than to say that the general outlines were similar to the one of 1843?

A. I cannot.

277 X Q. Can you be any more definite as to the colors used?

A. I cannot.

278 X Q. Please look at the lower of the two labels attached above the copy of your affidavit and state if you recognize that as a specimen of the J. & J. Clark label which was being used at the time that that affidavit of yours was made, in December, 1856.

(Question objected to as misleading, inasmuch as the affidavit of Mr. Knox referred to distinctly states as follows:

"J. & J. Clark & Co. have been using their present imitation of the plaintiffs' label for something more than a year, and are the only imitators of the said label in this market. They do not use it on all their white six-cord cotton; they only use it on their black spools. I have examined it in comparison with the plaintiffs'."

And in connection with the above defendants' counsel quotes the following from said affidavit:

"John Clark, Jr., & Co. originated their present label. There was no other label in this market combining the four colors used by them. Their design, mode, and arrangement of lettering was original."

715 Complainants' counsel protests against the above interruption by defendants' counsel as incompetent and improper, and gives notice that by reading from the copy affidavit produced he has made said affidavit his own evidence.)

A. I see the label and suppose it to be the one then exhibited—not the identical one; I mean the copy of the label then exhibited.

279 X Q. Do you mean that you believe it to be a specimen of the label then used by J. & J. Clark and which was the subject of the controversy in that suit?

A. I do.

(Label referred to is marked for identification "Paisley Clark label.")

280 X Q. I now call your attention to the following statement in your affidavit:

"J. & J. Clark & Co. have been using their present imitation of the plaintiffs' label for something more than a year, and are the only imitators of the said label in this market. They do n ot use it on all their white six-cord cotton; they only use it on their black spools. I have examined it in comparison with the plaintiffs'. It is a very close imitation and could hardly be closer without prejudice to the object. I cannot distinguish between the two without particular examination, and my eyesight is good. As a member of the trade I pronounce the label of J. & J. Clark & Co. complained of by the plaintiffs to be an imitation of the plaintiffs' label, contrary to the principles and practice of fair dealing established in the trade and calculated to deceive the public."

Are those statements true?

A. I think so.

716 281 X Q. Can you tell us what other labels J. & J. Clark & Co. were using at that time besides the one which you have identified and which has been marked "Paisley Clark label"?

A. At the present period I cannot.

282 X Q. Can't you even remember the colors or the general arrangement of any of said other labels?

A. At the present time I cannot.

283 X Q. Is it still your opinion, after examining the two labels marked for identification, "Clark Mile-end old label" and "Paisley Clark label," that the latter "is a very close imitation" of the former and that you "cannot distinguish between the two without particular examination, and my (your) eyesight is good"?

A. My opinion now is the same as at that time in regard to the general appearance of the label, but I observe now that in very small letters in the interior ring the one contains the word "Glasgow" and the other the word "Paisley;" also in the exterior ring the one contains the words "William Whitewright" and the other the words "George Clark," each having in the said exterior ring also the words "sole agent, New York."

284 X Q. Do you say now as you said in 1856:

"I pronounce the label of J. & J. Clark & Co. complained of by the plaintiffs to be an imitation of the plaintiffs' label, contrary to the principles and practice of fair dealing established in the trade and calculated to deceive the public."

A. I do.

(Defendants' counsel requests counsel for complainants to put entire copy affidavit which has been shown the witness and quoted from in evidence, and gives notice that unless he do so he will himself put it in evidence.

717 Complainants' counsel states that he does not understand it to be the practice for complainants to offer any evidence at this stage of the case; that he has no objection to defendants'

counsel offering the paper in evidence on his own behalf, provided, of course, that it be not taken from his possession.

Defendants' counsel offers the said paper in evidence on his own behalf, and it is marked "Defendants' Exhibit No. 54, Knox Affidavit." Defendants' counsel requests the examiner to copy the said affidavit here, and it is in the words and figures following:)

DEFENDANTS' EXHIBIT No. 54, KNOX AFFIDAVIT.

New York Supreme Court.

JOHN CLARK, JR., and MATHEW CLARK
against
GEORGE CLARK.

CITY AND COUNTY OF NEW YORK, *ss:*

Alexander Knox, of the city of New York, being duly sworn, deposes and says:

I do business at No. 5 Pine street and am general agent for the United States of Orrs & Macnaught's sewing cotton, a description in extensive use; we use an oak-colored spool, embossed on one No. 1. end, bearing on the embossed end a black and gold colored label lettered in black, "Orrs & Macnaught best six-cord," and in gold leaf on a black center ground the number of the thread and the quantity, thus, "200 yards," and on the other end No. 2. a white label lettered in black, "Alexander Knox, general agent". Specimens of our labels are in the margin marked 718 number- one and two; the prominent threads sold in this market are mine, Brooks', Glacé, Coats', John Clark, Jr., & Co.'s, and J. & J. Clark & Co.'s; Brooks uses a white spool, Coats a whitish yellow, and the two Clarks both use black spools; Brooks' label is a white ground with fancy crest lettered in blue and the number in white on a blue ground and the agents' names and number of yards in black lettering on a white label on the other end; one end of Brooks' spool is raised and slightly rounded; Coats' label is in black and gold and a white label with the agent's name on the other end; J. & J. Clark & Co. still use the white or whitish-yellow spool in part on their six-cord white thread, and did so altogether in this market until some two or three years ago; perhaps altogether is a little too broad; but I never saw any of their said thread on black spools till the time I mentioned, and should have seen it so if in general use; I have known the plaintiffs' six-cord cabled thread since about 1821; a relative and companion of my grandfather, who came in the same vessel with him to this country in 1821, brought the first invoice of it to this country in said vessel at that time; I have known the J. & J. Clark & Co. or Paisley thread since about 1825 or 1826, the occasion of which was that my father sent about £500 exchange to the plaintiff John Clark, Jr., to be supplied in thread, and the said John Clark, Jr., could not supply it, having made an engagement to send all his cotton to this

country through a particular house in Glasgow for a limited time, not then expired; my father then caused the money to be paid over to J. & J. Clark & Co., of Paisley, and let them ship to that amount, which was done, and this was the first invoice of any considerable amount J. & J. Clark & Co. ever sent to the United States; they may have sent samples; my father was a Scotchman and knew their house; before and at this time the cotton known in this country as Clark's cotton was of the plaintiffs' manufacture and
719 was the prominent cotton in this market and the only cotton known as Clark's; the plaintiffs' cotton was the first cotton ever sent to this country on spools; before they sent sewing cotton came here in hanks; my father continued to sell J. & J. Clark & Co.'s cotton for about three years for the accommodation of particular houses with which he was dealing in other goods, and at the end of that time he abandoned it on account of the demand being so trifling; some years afterwards J. & J. Clark & Co. commenced sending to James Lee, who had an agency of a different kind for my father; the said James Lee continued to sell for J. & J. Clark & Co. for several years; the demand for their thread was not to be compared with the demand for John Clark, Jr., & Co.'s.

John Clark, Jr., & Co. supplied the United States with as much, probably, as all other houses put together, and the demand for their six-cord white-cotton sewing thread, of which only I speak, exceeded the supply. It was their cotton which originated and continued to keep up the name of Clark's cotton or Clark's spool cotton in this country. Other cottons have come in and gone out again, but theirs has kept itself up and is the only cotton which has done so for so long a period. Its reputation has never declined.

J. & J. Clark & Co. have changed their label frequently and have had and now have different labels in this market at the same time on their best six-cord white cotton. John Clark, Jr., & Co. have exclusively used their present label in this market on their six-cord white cotton since about 1843, and it is universally known. They were the first in the trade to commence using black spools exclusively, and they have so exclusively used them on their said white cotton before and ever since 1843. Owing to the popularity of their thread, the call for black spools became so great that frequently white spools would be sent back to the sellers to be exchanged for black. I have been advised by persons in the trade to have
720 my thread put on black spools, but have declined doing so on principle, not wishing to imitate.

John Clark, Jr., & Co. originated their present label. There was no other label in this market combining the four colors used by them. Their design, mode, and arrangement of lettering was original.

J. & J. Clark & Co. have been using their present imitation of the plaintiffs' label for something more than a year and are the only imitators of the said label in this market. They do not use it on all their white six-cord cotton. They only use it on their black spools. I have examined it in comparison with the plaintiffs'.

It is a very close imitation, and it could hardly be closer without

prejudice to the object. I cannot distinguish between the two without particular examination, and my eyesight is good. As a member of the trade, I pronounce the label of J. & J. Clark & Co., complained of by the plaintiffs, to be an imitation of the plaintiffs' label, contrary to the principles and practice of fair dealing established in the trade and calculated to deceive the public.

ALEX. KNOX.

Sworn to before me this 20th day of December, 1856.

W. H. GREENE,
Commissioner of Deeds.

284*a* X Q. You don't think that the general public and retail purchasers look any closer at the wording and names on the labels of spool cotton if the general appearance of such labels is similar to that to which they have been accustomed, do you?

A. I do.

284*b* X Q. You mean that you do think that they look closely at the names?

A. I mean I do think they look closely at the names.

721 284*c* X Q. The names are different, are they not, on the Clark Mile-end old label and the Paisley Clark label?

(Objected to as misleading and a misleading misstatement as to what appears on the labels, for the reason that the manufacturer's name of Clark, being the same on both the labels, appears on both the labels, and because the name Clark is given a special prominence on the infringing label and appears twice upon it.

Complainants' counsel protests against the manifest attempt to prompt and coach the witness and to argue the case before him under the guise of an objection.

Defendants' counsel says that if it had been suggested by complainants' counsel that the objection be made out of the hearing of the witness defendants' counsel would have so made it; he disclaims desiring to instruct the witness, and calls the attention of the court to the evident intention of complainants' counsel to deceive the witness by putting the question in the form he has.)

A. Part of the name is different. Do you wish me to mention the difference? I find on the Clark Mile-end "J. Clark., Jr., & Co.;" on the Paisley Clark "Clark & Co."

285 X Q. Why don't you quote the whole of what is said on each label in connection with the names?

A. I was not asked to do so; the labels are in evidence for themselves.

286 X Q. What is the most prominent name and in the largest type on the Mile-end Clark label?

A. William Whitewright, I think.

287 X Q. And what is the most prominent name and in the largest type on the Paisley Clark label?

A. George Clark, I think.

288 X Q. Are the names of the manufacturers on both labels printed in equally small type?

722 A. I think so; on both labels the type appears to be the same sizes.

289 X Q. What is the full designation of the manufacturer and his place of manufacture on the Mile-end Clark label?

A. "J. Clark, Jr., & Co., Mile End, Glasgow."

290 X Q. What is the full designation of the manufacturer and his place of manufacture on the Paisley Clark label?

A. "Clark & Co., Seed Hill, Paisley."

291 X Q. And isn't the word "Paisley" in heavier type than the word "Glasgow" on the other label?

A. I think it is.

292 X Q. Do you think that the general public and retail purchasers, if they looked closely at these two labels, would be unable to see that the spools came from different manufacturers?

A. I think if they examined closely they would be able to see they purported to come from different manufacturers.

293 X Q. And do I understand you to say that, in your opinion, the general public and retail purchasers do look very closely at the wording and names on the labels for spool cotton?

A. I think they do, as a general rule.

294 X Q. And yet you still persist, do you, that the Paisley Clark label is "an imitation of the plaintiffs' (Mile end Clark) label, contrary to the principles and practice of fair dealing established in the trade and calculated to deceive the public"?

A. Yes; I still persist in that opinion.

295 X Q. Why do you persist in that opinion if you think that the general public, as a general rule, look very closely at the wording and names on the labels of spool cotton and would be able to see that the two labels purported to come from different manufacturers?

A. Because the Almighty has so constructed my mind.

296 X Q. Can't you give a little more definite reason for your opinion than that?

723 A. That is perfectly definite in my opinion.

297 X Q. Won't you look at cross-question 284 and state if you were misled or deceived in any way by that question?

A. Shall I read the question?

298 X Q. If you like.

A. The witness reads the question as follows: "The names are different, are they not, on the Mile-end old label and the Paisley Clark label"?

I cannot perceive it.

299 X Q. The question was a plain one, was it not?

A. I suppose so.

(Defendants' counsel says that it is clear from the answer made to 284 X Q. that the witness was not in fact deceived; his objection to that question was as to the character of the question as one likely to deceive, inasmuch as the question contained the statement that the names on the spools were different, whereas the fact is that the principal names, to wit, the names of the manufacturers, were the

same and not different, and because especial prominence is given by the infringing Clark to the name Clark, whereas it was only the names of the agents that were different.

Complainants' counsel points out that question 284 itself specified the name of Clark in connection with both the labels, so that it is evident that defendants' counsel is entirely mistaken as to the intention of the question, and was decidedly over-nervous and apprehensive as to what the answer might be; he also points out, inasmuch as the witness has testified that the two differing names of the two agents were the "most prominent" and "in the largest type" on the respective labels, that it is hardly correct to say, as defendants' counsel has said in his last objection, that "the principal names" were the same on each.)

Adjourned to December 1st, 1886, at 11 a. m.

724 NEW YORK, *Dec. 1st*, 1886—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of cross-examination of ALEXANDER KNOX:

300 X Q. Isn't it your understanding that ordinary retail purchasers of spool cotton are apt to be careless and inattentive to the details and lettering upon labels?

A. It is not.

301 X Q. Don't you think that some retail purchasers are apt to be so careless or inattentive?

A. I do not think so; I might add, I speak now my opinion as to retail purchasers as to the majority of retail purchasers; but there are some who may be careless; those who are careless are, I think, a small minority of the purchasers of spool cotton.

302 X Q. I believe you have said that you have never had any experience in selling spool cotton at retail; is that so?

(Question objected to as misleading; defendants' counsel does not understand that the witness has said that he has never had any experience in selling spool cotton at retail. Question withdrawn.)

303 X Q. Have you ever had any experience in selling spool cotton at retail?

A. Before answering that question I should like to know the distinction the gentleman draws between wholesale and retail.

304 X Q. Don't you know the distinction?

A. I think not; I think there may be a difference of opinion between us; I should like to know your distinction; in fact I cannot answer understandingly until I do know.

725 305 X Q. Will you please tell the court what you mean speaking of retail selling of spool cotton as distinguished from wholesale selling of the same article?

A. I mean that retail involves the breaking of dozens wrappers, boxes of dozens, selling a spool, two, or three; that wholesale involves the selling of packages, dozens, dozens and packages.

306 X Q. Now, please say whether you ever had any experience in selling spool cotton at "retail," as you have defined that term.

A. I think I have not had experience; it never was my business.

307 X Q. I call your attention to the following statement in your affidavit of December 20th, 1856:

"J. & J. Clark & Co. have changed their label frequently, and have had and now have different labels in this market at the same time on their six-cord white cotton."

Can you describe to us any of the other labels of J. & J. Clark there referred to beside the one which you have identified and which has been marked "Paisley Clark label"?

A. At this period of time I cannot.

308 X Q. Do you think you would recognize any of such labels if they were shown to you?

A. Possibly I might; I cannot say.

309 X Q. Please look at Defendants' Exhibit No. 22, J. & J. Clark No. 50 Thread, and state whether you can recognize that as a spool bearing one of the style of labels that was in use on the J. & J. Clark spool cotton in 1856 at the time your affidavit was made.

A. I see what this spool contains, but I cannot at this time identify that as a spool that I ever saw before; particularly after thirty years have passed since that time.

310 X Q. And you can't now identify or recognize the labels on that spool "Defendants' Exhibit No. 22"?

726 A. I can read all they contains, but as to identifying or recognizing them I must positively decline. I think that recognizing implies a previous knowledge. I have no previous knowledge that this spool was ever in my hand at that time. How, then, could I recognize it?

(Witness takes the exhibit up in his hand as he makes the last remark.)

311 X Q. And you can't recognize or identify the labels on that spool Defendants' Exhibit No. 22 as similar to any you ever saw on the J. & J. Clark & Co. spool cotton?

A. I beg your pardon, similar they may be, but that is the first time that word "similar" has been used in to-day's examination to my knowledge. I would not dare, I would not be so presumptuous as to imagine any respectable gentleman would endeavor to push me into such an acknowledgement.

(Defendants' counsel again calls the attention of the court to the evident intention of complainants' counsel to mislead the witness by questions 308, 309, and 310 X Q. into using language which would be read perhaps to mean that witness had never seen spools with such or similar labels, while the witness' real meaning might be, and evidently appears to be, that he cannot identify the individual spool and individual label of the exhibit. Defendants' counsel asks complainants' counsel to make his questions free of such ambiguities.

Defendants' counsel further says that at request of complainants'

counsel the witness retired from the room during the recording of this objection.

Complainants' counsel protests against the above statement and argument as wholly unfounded upon the proceedings, as he
727 thinks will be apparent from their perusal, and regrets that defendants' counsel should have been led by his apparent nervousness and chagrin at the witness' testimony to make such imputations or statements.

Complainants' counsel begs defendants' counsel not to interrupt the examination of the witness again to interject upon the record his interpretations upon the testimony.

Complainants' counsel has so far as he was aware given the witness every opportunity to fully explain himself and will continue to do so. He begs defendants' counsel to confine himself to the use of courteous language.)

312 X Q. You say in your last answer of the labels on Defendants' Exhibit No. 22 that "similar they may be." Will you please tell us whether you are able to recognize those labels on Defendants' Exhibit No. 22 as similar to any labels that you ever saw on the J. & J. Clark & Co. spool cotton in or prior to 1856?

A. Please read me the previous question and answer.

(Question 311 X Q. and answer read to the witness.)

A. (con.). I mean to say that these labels are similar, but that they are identical I cannot say after so long a period of time.

313 X Q. Can you say in what respects or particulars you can recognize the labels on Defendants' Exhibit No. 22 as similar to any that you saw on any of the J. & J. Clark & Co. spool cotton as early as 1856?

A. I never said that I recognized this at all. I told you that I didn't. I differ in the interpretation of the word "recognition" or "recognize." I say this, that I positively wish it understood that I do not positively testify now to a time thirty years ago, when the circumstances were fresh in my memory, and I decline to be
728 so considered as testifying regarding any particular features of difference which had never impressed themselves upon my mind, I having no interests whatever in the results, so as to leave more vivid impressions as might have existed had I had a interest to serve. I think that's all.

314 X Q. Question repeated.

A. Merely in the general features—merely in features.

315 X Q. In what features do you recognize the labels on Defendants' Exhibit No. 22 as similar to any that you saw on the J. & J. Clark & Co. spool cotton as early as 1856?

A. I have stated repeatedly that I do not recognize, using the term "recognize" as I understand recognize. I merely say that I perceive the general feature of similarity.

316 X Q. Please state what general features of similarity you "perceive" and can now say were to be found on any of the J. &

J. Clark & Co. labels as early as 1856 and are now found on Defendants' Exhibit No. 22.

A. I know nothing further. That's all in regard to the matter at present, and don't know that I ever can know anything further.

317 X Q. Do you mean to say that you are unable to point out or describe what you speak of as general features of similarity between the labels on Defendants' Exhibit No. 22 and any of the J. & J. Clark & Co. labels used in or prior to 1856?

A. I do not mean to say any such thing. I thought I had already pointed out the general features. I absolutely decline to go further.

318 X Q. Pardon me for not understanding to what you refer as "general features of similarity." Please state what you do refer to by those terms.

A. I have already said there is the spool in evidence, and that is all I desire to say in regard to the matter.

(Witness takes up the spool.)

729 319 X Q. The fact that the spool, Defendants' Exhibit No. 22, is in evidence hardly informs us in regard to your memory as to any features of similarity between its labels and any that you saw on J. & J. Clark & Co.'s spool cotton as early as 1856. We are trying to find out whether Defendants' Exhibit No. 22 can be relied upon as a specimen of the J. & J. Clark & Co. labels in use as early as 1856, or if not, then in what respects it resembles and differs from the J. & J. Clark & Co. labels as then or previously used; can't you give us some information upon that subject?

A. I think not. I will say that when I made that affidavit I haven't the slightest doubt but that I saw specimens of various labels on the J. & J. Clark & Co. thread, to which that portion of my affidavit about their having several labels alludes.

(Witness points to the Defendants' Exhibit Knox Affidavit.)

I am quite sure that I honestly testified to the facts then known; but after thirty years have passed I positively decline to commit myself to an opinion worth a straw in regard to that matter.

(The question and answer re-read to the witness to see if he desires to make any further answer.)

320 X Q. As you use the term "similar" or "general features of similarity," do you regard the black and gold label on Defendants' Exhibit No. 22 as similar or having general features of similarity to the label marked "Paisley Clark label"?

A. Not at all.

321 X Q. Those two labels you regard as distinctly different from each other, do you?

A. Which two do you mean?

322 X Q. I mean the black and gold label on Defendants' Exhibit No. 22 and the label marked "Paisley Clark label."

A. I do.

730 323 X Q. If the spool, with its labels, marked Defendants' Exhibit No. 22 be in fact one of those actually made and sold by J. & J. Clark & Co., isn't it clear from the black and white label on the reverse end that it illustrates labels used while George Clark was the general agent of that thread in the United States?

A. It appears so.

324 X Q. Did you know the firm of Holgate, Wright & Co. in or prior to 1855?

A. I don't recollect them at all unless the Wright may be a gentleman whom I did know. I can't say whether it is so or not, I am sure. The gentleman I knew of the name of Wright was a member of the firm of Gibson & Wright, bankers and brokers, and subsequently, I think, raw-cotton brokers.

325 X Q. Did the Mr. Wright you speak of deal in spool cotton?

A. Not to my knowledge.

324*a* X Q. Please look at the paper now shown you, being a copy of an affidavit of one John Young, purporting to have been sworn to on December 24, 1856, and look at label attached to that paper and say whether, according to your best recollection, that label is not a specimen of the J. & J. Clark & Co. label which was used on their thread prior to the time when they commenced to use the label marked Paisley Clark label and which was complained of as an imitation of the Clark Mile-end label.

A. Really I cannot say. I cannot answer the question.

Adjourned for lunch.

325*a* X Q. Do I understand you to mean that you are unable to say whether or not the label attached to the copy of affidavit of John Young is or is not a specimen of the J. & J. Clark & Co. label which was in use prior to the suit of 1856?

A I cannot say what you understand me to say, but I do
731 say that this label is different from either of the other two—"Clark Mile-end" and "Clark Paisley" labels.

326 X Q. Are you prepared to say that the label attached to that copy affidavit of John Young is not the style of label which was used by J. & J. Clark & Co. up to about 1855?

A. I am prepared to say it is not a copy of either of the other two labels. In the outer circle it has a species of wreath in place of any names whatever—in place of the names of the agents in either of the other labels.

327 X Q. I don't think you quite understand the question. You have identified a label marked Paisley Clark label as one used by J. & J. Clark & Co. at the time of the suit in 1856, and you say in your affidavit of December 20th, 1856:

"J. & J. Clark & Co. have been using their present imitation of the plaintiffs' label for something more than a year and are the only imitators of the said label in this market."

That statement would bring the origin of the Paisley Clark label back into 1855. Now, what I want to know is whether you can say that the specimen of label attached to the copy John Young's affidavit is not the J. & J. Clark label used prior to 1855? I under-

stand you to have said that you really cannot say that it is the label. Now, I want to know whether you are prepared to deny that it is the label used prior to 1855?

A. I cannot say that I have in my previous testimony identified the two labels as being one and the same—an exact imitation. From the leading features of the two labels I think the one is an imitation of the other in general features, but not in the lettering or wording. In this label attached to John Young's affidavit, while said label is to a certain extent an imitation in its features and outline, I am not prepared at the present time to affirm or deny that it is or is not the label used by them in 1855 or immediately prior thereto.

732 328 X Q. Are you prepared to say that you ever saw any of the J. & J. Clark & Co. spool cotton prior to 1855 that did not have on it the label of which the one attached to the affidavit of John Young is a sample?

A. I think I am prepared to say that it is very probable I saw this label before or about the time of December, 1856, though I do not charge my memory with the assertion that it was or was not, because, for the reasons above stated, my introduction of Orrs & Macnaught commenced in the year 1855, and I have no doubt in my mind that when these affidavits were made the statements they embraced were correct, viz., that I was shown the labels purporting to represent the manufacture of J. & J. Clark's Paisley thread previous to or at the time described in the affidavit, and I fully and sincerely believe that when the affidavits were made they were honest and correct.

(Objected to by defendants' counsel, as it is evident the witness has misunderstood the question.)

328*a* X Q. For anything you know to the contrary, the specimen of label attached to the copy affidavit of John Young may be a true specimen of the J. & J. Clark & Co. label used prior to 1855; is not that so?

(Defendants' counsel suggests that complainants' counsel use the words "a label" or the words "one of the labels," instead of the words "the label," in referring to the J. & J. Clark label in question, because of what the witness appears to have said in the affidavit referred to as to the labels being various, and because of Defendants' Exhibit No. 22, referred to by the witness.

Complainants' counsel protests against the above statement being made in the hearing of the witness, as tending to influence his testimony.)

733 A. I cannot say.

329 X Q. You don't know or remember anything to the contrary, do you?

A. I do not recollect; I do not remember at present.

330 X Q. Is it not true that, for anything you know or remember to the contrary, the label attached to the copy affidavit John Young

may be a sample of the only style of black and gold label used on the J. & J. Clark thread before 1855?

A. I think it is not true.

331 X Q. What do you remember to the contrary?

A. I remember that the label shown in Exhibit No. 22, in my opinion, antedated the label now in question.

332 X Q. Just before we adjourned this examination for lunch you couldn't remember much about the label on Exhibit 22, could you?

A. Well, my memory is not very fresh after thirty years in either of the cases. Still my impression is in favor of my present statement.

333 X Q. Is your memory any better since you went out to lunch than it was before?

A. Well, I have continued to protest against this pettifogging system, in my opinion—that when a witness endeavors to state the truth he will persist in trying to get him to state what is not the truth.

334 X Q. Question repeated.

A. Same answer.

335 X Q. Do you decline to make any other answer?

A. I do not. I have made all the answer I can to the questions propounded.

336 X Q. Do you think you have told us whether or not your memory is better now in regard to Defendants' Exhibit 22 than it was before lunch to-day?

A. It is a question I cannot answer. You can judge for yourselves.

337 X Q. You don't know, then; is that what I am to understand?

A. You said it. Understand it as you please.

338 X Q. Who did you take lunch with to-day?

734 A. There were quite a number in the lunch-room. I didn't inquire anybody's name.

339 X Q. Didn't you go to lunch with anybody connected with this case?

A. I went to luncheon, certainly, with two parties who were then in this room and had my lunch. I have at the same place met Mr. Betts, who is cross-examining me at the present time. I suppose he went there to get his lunch on these occasions. I don't know whether it was more than once or twice.

340 X Q. Who were the "two parties"?

A. Mr. Palmer and Mr. Witter.

341 X Q. Mr. Palmer is the agent of the defendant company in New York, is he not, who brought you here to testify?

A. I wish here to say that it may be true for anything I know, but I haven't yet been furnished with the case at all or what it is for or who are the plaintiffs or defendants really. I have neither had personal or ocular demonstration of the title of the case, what is claimed and what is not claimed.

342 X Q. Why did you omit to mention the fact that you had

lunched with Mr. Palmer and Mr. Witter until you had been asked the question three times, and why, before you admitted whom you had lunched with, did you volunteer to mention that you had seen me in the lunch-room on some occasion?

A. In the first place, I was not aware I had been asked the question three times, and I think it was after I had told the names of the gentlemen that I mentioned the fact that Mr. Betts had been in the same dining-room on one or two occasions when I was there, and if he had allowed me time I would have given them all in one answer, if he had just mentioned what he wanted. I had no idea that he had asked the question three times. If the gentleman thinks that I am evading the answers to any of his questions I must say to him that he is entirely wrong.

735 343 X Q. Why did you think it advisable to mention at all that you had seen me once or twice in the same dining-room?

A. I can only say that I thought where he was would be a respectable place and not one wanting in respectability.

344 X Q. You never took lunch at the table with me there or elsewhere and have never spoken to me outside of this examination-room, have you?

A. I think I have; I think I spoke to you in the chop-house or dining-room—Astor chop-house I think it was called. I wish to say I do not recollect sitting at the same table with the gentleman; I would not consider it an honor to do so.

345 X Q. You not only do not recollect doing so, but you are sure you did not; is not that true?

A. I think that is true.

346 X Q. And what did you say to me on the occasion when you think you spoke to me?

A. I know I spoke to you, and the purport of my remark was, "Oh, you patronize this institution also?"

347 X Q. Were you in company with Mr. Witter and Mr. Palmer that day also?

A. I think I was; I am sure I was.

348 X Q. Did anything occur at lunch time to-day to stimulate your recollection in regard to Defendants' Exhibit No. 22?

A. Nothing to my knowledge that I now recollect. I don't know that any stimulants were imbibed by any of the party. I had a small glass of Bass ale, I think it was, and water without ice; ice water don't agree with me at all; I had a small plate of roast beef and one potato, a little bread and butter. This consisted the whole repast, excepting we had a small plate of ox-tail soup. Mr. Witter and I had alike in that respect. There was just one little piece of ox tail.

(Answer objected to as irresponsive.)

736 349 X Q. I don't think you quite understood the purport of my question. What I wish to know is whether anything occurred or was said at lunch time to-day which tended to refresh

or sharpen your recollection in regard to Defendants' Exhibit No. 22.

A. Nothing to my knowledge; as far as I can recollect, nothing.

350 X Q. Was the testimony which you are giving talked over?

A. I have no recollection that it was.

351 X Q. Was Defendants' Exhibit No. 22 mentioned?

A. Not to my knowledge.

(Complainants' counsel has the copy affidavit of John Young and label attached thereto, which has been exhibited to the witness, marked for identification as "Exhibit Young Affidavit" and "Exhibit J. & J. Clark & Co. Old Label."

Witness picks up the Young affidavit and remarks, "This is Clark & Co., not J. & J. Clark & Co."

Defendants' counsel requests complainants' counsel to permit him to have a copy made for defendants of the paper about which he has questioned the witness and which has been marked for identification "Exhibit Young Affidavit" and "Exhibit J. & J. Clark & Co. Old Label.")

352 X Q. Do you mean to be understood as saying that you don't know what the present suit, in which you are testifying, is about?

A. I do mean to say that I have never been officially informed and do not know whether it is Coats against Merrick Thread Co. or Auchincloss against the Merrick Thread Co. I do not know the charges of the plaintiffs, and the names of the plaintiffs I equally do not know, so that, even if my family asked or any other
737 persons, all I can say is it is some dispute between spool-cotton manufacturers. That, I think, embraces all I know about it.

353 X Q. What do you mean by "officially informed"?

A. I mean by "officially informed" some document from the court summoning or subpœnaing me to appear as a witness in the case.

354 X Q. Then you have not been subpœnaed to give your evidence?

A. Not to my knowledge.

355 X Q. At whose request did you come voluntarily?

A. Not voluntarily, exactly. Mr. Palmer and his counsel orally and occasionally by letter stating that the examination would be continued on a certain specified day and hour at this office, Mr. Palmer called upon me several times at my house, even during the summer when I was out of town, and asked me to attend and give my testimony; and since the taking of the testimony was commenced I received two or three notes informing me that it would be continued on certain days and hours named in the notes.

356 X Q. Are you aware that it is claimed in this suit that the Merrick Thread Co. have unfairly imitated spools, labels, and appearance of the J. & P. Coats goods?

A. I have come to that information by degrees.

357 X Q. So far as you understand, that is what the suit is about, is it not?

A. I think so; that is just what I have heard from the counsel of the plaintiffs.

358 X Q. When did you hear that from the counsel for the plaintiffs?

A. In just the last question you gave within the last fifteen minutes.

359 X Q. Didn't you know it before that 356 X Q. was asked you?

A. Really, I couldn't say that I did; that never appeared, as far as I know or recollect, in the examination heretofore; now,
738 counsel for the plaintiffs and counsel for defendants have stated to me what is the fact, I believe, but which I did not know before.

360 X Q. Counsel for defendants hasn't said anything of that kind to you to-day, has he?

A. Why, this afternoon; and he has sent me notes in reference to the continuation of this examination; I have some of them now in my pocket.

361 X Q. Do you mean to say that counsel for the defendants has never told you what this suit was about prior to to-day?

A. I mean to say just what I have stated—that I did not comprehend what the suit was about at all.

362 X Q. And never were informed until I asked you just now in the 356 X Q.?

A. I don't say so.

363 X Q. What do you say on that question?

A. I say I never heard until this afternoon such full and clear information as I now have from both the counsel in this case.

364 X Q. When and where did you get that full and clear information from the defendants' counsel?

A. I did not say from the defendants' counsel exclusively; I said from the counsel of both parties this afternoon; I received that full and clear information from complainants' counsel this afternoon and partial information from the defendants' counsel at various times from these notes and from Mr. Palmer on various visits, and now have the case clear to my mind because both counsel concur.

365 X Q. The defendants' counsel hasn't explained to you or said anything about the nature of this suit while this examination has been going on to-day, has he?

A. I understood him to say here that when he sent me these notes advising me of the days and hours that that was giving me information; he said that this afternoon; he spoke of these notes this afternoon in my presence in this room.

366 X Q. Did these notes tell you what the claims of the plaintiffs were in this suit?

739 A. They did not. Here is one.

(Mr. Betts says he don't care to pry into Mr. Witter's note.

Defendants' counsel has no objection to the notes appearing fully to the court, but he takes occasion now, after having exercised considerable patience, as he thinks, to protest against the needless, as it

appears to him, cross-examination of this witness, involving as it does large expense to defendants in time of counsel, printing, and magistrate's fees, etc.; at the same time he courts the fullest inquiry into the matters fairly connected with the issues of the case.)

367 X Q. When first did you hear from any one that it was claimed in this suit that the Merrick Co. had unfairly imitated the spools, labels, and appearance of J. & P. Coats' goods?

A. I cannot tell when. Mr. Palmer called upon me occasionally for the last two or three years, I guess. That's as near as I can fix the date. My eldest daughter, who was in town during the summer, mentioned that he had called at my residence for the purpose of procuring my testimony in a case then pending between Coats and them or Auchincloss and them; I cannot tell which. I have in my possession two notes from him in reference to the matter, one postmarked November 12th, the other postmarked November 16th, merely stating that he would call for me the following mornings, I think, knowing that I was very unwell. I think I had three from Mr. Witter, merely stating the same thing, that the testimony would be resumed at such a time.

368 X Q. Then it is hardly correct to say, is it, that you were not informed that it was claimed in this suit that the Merrick Co. had unfairly imitated the spools, labels, and appearance of J. & P. Coats' goods prior to the asking of the 356 X Q.?

A. I think it is correct, entirely correct, because in none of
740 these notes is the case stated who the contending parties are, merely informing me that the examination would be continued at such and such times; that didn't state the case at all nor anything whatever, merely notices that the examination would be resumed, and I think this repetition of these puerile questions altogether below the dignity of a gentleman. It shows, in my opinion, a diseased mind; I would add, a diseased and depraved mind.

369 X Q. Do you think that the language that you have used in your last answer is calculated to impress the court with your coolness and impartiality as a witness?

A. I think so.

370 X Q. It seems to me that there is an inconsistency between your answer to the 359 X Q. and that to your 367 X Q. In the 359 X Q. you couldn't say you knew what the suit was about until the 356 X Q. was asked. In the 367 X Q. you state that you first heard what was claimed in the suit, as near as you can fix the date, when Mr. Palmer called upon you during the last two or three years. I shall be glad to have you explain the seeming inconsistency, if you wish.

A. I will. It is perfectly easy to my mind. It seems to be cro-chety to his—I mean to the counsel asking the cross-question. The interviews with Mr. Palmer at my house were very brief and I was suffering acutely from asthma and catarrh occasionally, and, as I stated this afternoon, I never had any official information emanating from the court or any of its officers. The conversation was merely that I was wanted to state what I knew of spool cotton, not

to be pumped or probed or squeezed or nudged or to be absolutely put upon my trial in regard to my integrity. That will do.

ALEXANDER KNOX.

741 NEW YORK, *Dec. 23d*, 1886—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of the cross-examination of ALEXANDER KNOX:

(Complainants' counsel for the purpose of identification here has copied upon the record the paper shown to the witness marked Exhibit Young Affidavit.

Defendants' counsel here states that he has no objection to the above paper with its annexed label forming a part of the record in this case, provided the rest of the pamphlet of which the said affidavit forms page 77 be also exhibited to the court, and defendants' counsel states that in his opinion it will not be fair that said affidavit should alone go before the court for many reasons, one of which is that the other parts of the pamphlet will, in his opinion, show that the label annexed to this Young affidavit was not the only label used by J. & J. Clark, although it may have been a label with a black spool.

Complainants' counsel objects to the statement as improper in view of the fact that the counsel for defendant- is not a witness or subject to cross-examination.

The question as to the competency or the admissibility of the pamphlet referred to does not now arise. The present Exhibit Young Affidavit is produced and used simply as a part of the cross-examination of the present witness to test the accuracy and fullness of his memory.)

742 The affidavit is as follows:

EXHIBIT YOUNG AFFIDAVIT.

(*Additional Affidavit on part of Defendant Served After Order.*)

Supreme Court.

JOHN CLARK, JR., and MATTHEW CLARK
v.
GEORGE CLARK.

CITY AND COUNTY OF NEW YORK, *ss:*

John Young, of the city of Brooklyn, being duly sworn, deposes and says that he is one of the firm of Wetherald & Young, importing merchants, whose place of business is at No. 28 Pine street, in the city of New York; that in the year 1849 deponent's said firm purchased and sold large quantities of spool-cotton thread manufactured by J. & J. Clark & Co., and continued so to do for several years; that the said thread was put up in black spools in packages of a dozen, wrapped in blue papers and tied with small white twine,

and upon each spool and package was a label similar and exactly in all respects to the following specimen; that the deponent's said firm sold said thread with said labels and put up in the said manner till about the year 1853; that said thread has always to deponent's knowledge been known to the trade and public as Clark's cotton and Clark's spool cotton; that deponent is well acquainted with the thread manufactured by the plaintiff-, sold in this country by William Whitewright; that the thread manufactured by
743 them has to deponent's knowledge been always known and distinguished by the trade and public as Whitewright's Clark's spool cotton in contradistinction to the thread manufactured by J. & J. Clark & Co.

JOHN YOUNG.

Sworn to before me this 24th day of Dec., 1856.

PHILIP JORDAN,
Comm. of Deeds.

371 X Q. I call your attention to the statement in Defendants' Exhibit No. 54, Knox Affidavit, in which you use the following language:

"We use an oak colored spool embossed on one end, bearing on the embossed end a black and gold colored label, etc."

And you have identified the label and stated, I believe, that the spools then used were reddish in color and somewhat larger than the spools of other makers. When you used said reddish-colored large-sized spools there was a very marked and noticeable difference between the Orrs & Macnaught make-up of spool cotton and that of Messrs. J. & P. Coats, was there not?

(Objected to as leading.)

A. I didn't say "other makers." I said "some other makers." No; I think not, you use the word "large" there as a very comprehensive term. I would say in my judgment "larger" than some other makers. I would not say there was a marked difference. There was some difference in size between it and some other makers. I would not say there was a very marked difference. The expression used in the question would embrace the difference between the mammoth and the mouse. I cannot conceive that Orrs & Macnaught would be so ridiculously foolish as to make a very marked difference, such as would be comprehended in the question
744 as first asked, being very old manufacturers, as they were. There was some difference, but I wouldn't say a very marked difference in size.

372 X Q. Do you think that the Orrs & Macnaught spools, which were reddish in color and were somewhat different in size from the spools of some other makers, would have been likely or were apt to be mistaken for those of Messrs. J. & P. Coats?

(Objected to as leading.)

A. I do not think so.

373 X Q. Do you think that the reddish color of the spools gave the Orrs & Macnaught goods any distinctive appearance?

A. I do. They were oak spools, which was a distinctive feature.

374 X Q. Was there any other feature of the Orrs & Macnaught spools and make-up other than the name of the labels which gave them a distinctive appearance?

A. Not that I am aware of, excepting that they had what we called the No. 45 and Coats had no No. 45, but a No. 46 instead of No. 45. I am not aware of any other distinction excepting that named.

375 X Q. Were the spools of the Orrs & Macnaught thread any larger than the corresponding numbered spools of Coats or was the difference in size you have spoken of one between those of other manufacturers?

A. It appears to me perceptible that in some numbers the wood of the oak spool was larger than that of some other manufacturers without naming any particular one, and that was, as far as I could judge, not perceptible in the whole range of numbers, but only in certain numbers which might have got mixed in the manufactory—that is, that the empty spools in the manufactory might have got mixed without its being intentional. I cannot say.

376 X Q. Please name all the manufacturers in comparison
745 with whose spools you thought that certain numbers of the Orrs & Macnaught spools were larger.

A. I cannot name all of the manufacturers.

377 X Q. Please name all whom you can remember.

A. That were larger or smaller; which do you want?

378 X Q. I want the names of those whose spools, when compared with the Orrs & Macnaught, showed that the Orrs & Macnaught spools were larger.

(Defendants' counsel inquires whether the question is intended to ask for a comparison between other makers and the Orrs & Macnaught oak spools or the Orrs & Macnaught spools as used after the oak spools were discarded, and as shown in Defendants' Exhibit No. 48.

Complainants' counsel answers that the question relates to the reddish-colored oak spools, as he does not understand that the witness has said that any others were larger.)

A. I cannot give the names; I would not attempt it; my reason for advising the discarding of oak spools was not on account of the size particularly, though that was one idea, but on account of my impression or supposition that the pyroligneous acid exuding or emanating from the oak tended to weaken the strength of the thread on such spools, and while advising a change I suggested that in making it the size of wood might be reduced at the same time so as to save expenses of freight, measurement, and weight, without reference to the size of any other manufacturer's spools; as I mentioned, it was thread they wanted and not wood. I might add that subsequently, long subsequently, I would say—years afterwards—I suggested that the thread be put in balls of two hundred yards in-

stead of on spools and thereby subject only to a 40 per cent. ad valorem duty instead of specific additional duties—I think six
746 cents each hundred yards. I filed a caveat in the Patent Office for this idea and had some shipments of thread in that style made and gave the buyer of said balls the opportunity of saving the 12 cents on 200 yards, and having a superior article, in my opinion, for the manufacture of shirts and other articles that had to be washed—having a superior article, more elastic and less liable to break in the operation of washing and ironing and laundering. I didn't take a patent out because I was about to retire from business. I secured a caveat, which lasted for about seven years, I think. I procured some document from the Patent Office through my lawyer, Mr. Stetson; it may have been a design patent. I don't know what it was.

379 X Q. I call your attention to the following statement in your affidavit of December 20th, 1856:

"I have been advised by persons in the trade to have my thread put on black spools, but have declined doing so on principle, not wishing to imitate."

Please tell me what your idea was about that matter and why you thought it wrong to have your thread put on black spools.

A. This matter occurred thirty years ago this month and to suppose that the ideas that occupied my mind at that moment are now fresh are to me absolutely incomprehensible and to ask which indicates that a fool may ask when it takes a wise man to reply. I positively assert here what I have said repeatedly, that the testimony I gave thirty years ago was absolutely true, and I now repeat my desire to testify the truth so far as it at present exists in my mind without being catechized as to what might then have existed in my mind as an idea.

380 X Q. Did you think that Messrs. John Clark, Jr., & Co.'s thread having been put up for many years on black spools that it would be an act of unfair trading on your part if you should have your thread put up on similar spools? Please look at
747 your affidavit, if you wish to, and state if that is the explanation of the statement quoted from it in the last question.

A. I don't know; I can't say anything about it. I don't know what the last question was intended to communicate or to ask for. This affidavit seems to be in the hands of the gentleman or in his mind a kind of jumping-jack, which is very suitable for the holidays; but I have very decidedly and repeatedly said that I would just let him have it for his amusement as long as he pleased. I am not going to be abused any longer with it.

381 X Q. Will you kindly tell us whether upon the facts as stated by you in your affidavit of December 20th, 1856, in regard to the use of black spools by Messrs. John Clark, Jr., & Co., you now think that it would have been an act of unfair trading on your part to put up your thread on similar black spools?

A. My answer to that is that I received the thread of Orrs & Macnaught on consignment from them. They had in their judgment, without directions from me, adopted an oak spool. At the

time that affidavit was made, thirty years ago, I had just received six or nine months' supply, the first shipment or consignment. My business was to sell their thread, whether it was on black, white, blue, or red, and in this affidavit, in which I had no interest whatever, which certainly, as far as I can recollect, didn't occupy an hour—I signed the affidavit as my mind was then affected, without being submitted to several days' cross-examination, to be crossed again thirty years hence, if Providence should permit us to live. I would add what I have repeatedly said, that, having no interest in that controversy, that said affidavit, I had a recollection, a general recollection, of Gen. Stoughton's office in Wall street and of Martin & Smith's, but whether I was in there five times or once I cannot say. I certainly do think that I wasn't an hour engaged in that whole matter, and circumstances alter cases sometimes, at all times.

748 382 X Q. I don't think you have answered the question. Will you please hear it read and try to answer it?

(Last question re-read.)

A. I can't say; upon my word I can't say.

383 X Q. I call your attention to the statement in said affidavit of December 20, 1856, in which you speak of the Orrs & Macnaught spools then used as being "embossed on one end." Was there anything distinctive in the appearance of the Orrs & Macnaught spools on this account?

A. I think it was a little ornamental.

384 X Q. Please answer the question as to whether you do or do not think that said embossing gave the spools a distinctive appearance.

(Objected to as leading, the witness having already answered the question as he understands it.)

A. I have answered already the question fully in my opinion. I would remark that, as I recollect, the embossing varied in regard to the size of the space outside of the label, some spools being larger and some smaller in regard to that space. The embossing varied in character and design and in proportion to the space of wood exhibited outside of the label.

385 X Q. What I want to know is whether, in your opinion, the fact that the spools were embossed in the manner referred to by you gave the Orrs & Macnaught spools a distinctive appearance as compared with those of other manufacturers.

A. I think it did.

386 X Q. Please look at the embossed patterns on the Orrs & Macnaught's spools in Defendants' Exhibit No. 48 and state if any of those patterns are the ones referred to by you.

A. Some are and some are not. Some are plain, without any embossing; some are simply lines and some appear like leaves. None of them attracted my attention. I thought they were

749 of secondary importance at all times. Some were embossed and some were plain.

387 X Q. Was it the fact that the spools were embossed or the particular pattern embossed on them which gave the Orrs & Macnaught spools a distinctive appearance?

(Objected to as leading.)

A. I think the oak spools was the distinctive appearance presented; it was that selected by them at first and incorporated by them in their invoices.

388 X Q. Please answer the question if you are able to.

A. I have answered as well as I am able to.

(Witness says, "I wish you would read the question again, if you please.")

(Question 387 X Q. repeated.)

A. I thought the question was what I thought gave them a distinctive appearance. I understood the question to mean what I say now.

(Defendants' counsel says, "Do you understand the question, Mr. Knox?"

Witness says, "I confess I do not. All I wish to say to-day is that the name of Orrs & Macnaught on one end and of Alexander Knox on the other end gave them their most valuable and distinctive appearance.")

389 X Q. Is that the best answer you can give?

A. It is the best answer I can give.

390 X Q. I call your attention to the statement in your affidavit of December 20, 1856, where you say, "One end of Brooks' spool is raised and slightly rounded." Do you remember the particular formation of Brooks' spool then alluded to?

A. I do.

391 X Q. Did that formation give to the Brooks spools a distinctive appearance as compared with those of other manufacturers?

A. It did.

750 392 X Q. Did you know of any other manufacturer who so shaped one end of their spools?

A. I do not recollect that I do.

393 X Q. Do you think it would have been a case of unfair business method for a manufacturer to have imitated Brooks' spools in that respect?

A. Yes; I do.

394 X Q. Please look at the specimens of Brooks' spools contained in Complainants' Exhibit Box Comparative Samples and state if those exhibit the construction of Brooks' spool head referred to by you.

A. The Brooks samples do.

395 X Q. At what price did you sell the high numbers of the Orrs & Macnaught spool cotton as compared with the price at which you sold the low numbers?

A. For years I sold all numbers at the same price.

396 X Q. Did you ever make any difference in the price by reason of the fact that the upper numbers were not six-cord thread?

A. I did to one customer make a difference for several years; for several years Orrs & Macnaught's invoices were all at one price for all numbers, say twelve shillings sterling per gross, the British invoice price. Some time after the commencement of the war of the rebellion, when the staple cotton had advanced in value and when Orrs & Macnaught continued to invoice at the old prices, having, as they alleged, a large stock of staple on hand at the commencement of the war, Mr. John Orr, of Glasgow, and two friends, having, I think, in 1860 visited the United States on a trip of pleasure and business, and laid in a very large supply of staple, from which they were continuing to manufacture their yarns and thread, they continued to invoice their thread as they had done previously, not having bought any of the staple at the advanced high prices, and having refused to sell to Grover & Baker's establishment, in London, excepting for cash down, and they,

751 Grover & Baker, of London, getting their supplies from other sources for that market, the London market, discovered that the British prices of cotton threads had a range of three distinctive classes, varying from time to time instead of 12 shillings per gross for all numbers to 16, 14, and 12 shillings per gross, according to the range of numbers, the highest price being for six-cord, say, from 8 to 45, the next from 50 to 90, and the third from 100 to 200, the lowest range in price. When Grover & Baker in New York returned to me for supplies they had discovered that their fine or high numbers (of which Grover & Baker used by far the largest proportion of any other sewing-machine thread) was cheaper in England, taking the English and Scotch manufacturers. I want you to distinctly understand that Grover & Baker having discovered that the high numbers were lower priced (I mean in the British market)—the three ranges would range from 9 to 13 shillings per gross—it was customary to range to invoices in three prices. That's the reason why I made them an exception to the general customers and sold them the numbers from 100 to 200 at ten cents per dozen less than to the general trade as an exception. That was the only house I would make an exception to; that was the three-cord thread; that was an exceptional case.

397 X Q. Do I correctly understand you to say that, with the exception of the Grover & Baker purchases referred to, it was always your custom while you were in business to sell all the numbers of spool cotton at a uniform price per dozen, irrespective of the fact that some of the numbers were six-cord and some not?

A. It was.

398 X Q. Was that also the general custom of all dealers of spool cotton in the United States during that period?

A. As far as I know it was, excepting for large special orders for particular numbers.

399 X Q. Do you mean that on large special orders for particular numbers discounts from the regular prices would be given?

752 A. I do not mean exactly that. For example, special orders for 8 and 10 would by no means get any discount whatever, and for special orders of 90 and 100 discounts would be given according to agreement in large orders. Various circumstances necessarily require this or the manufacturer could not exist. For example, in a dozen of No. 8 large weight of cotton would be required, leaving no profit whatever, and in large quantities of 90 and 100 three-cord thread the labor would exceed the raw material, whereas in the *the* case of the 8 the raw material would greatly exceed the labor. It is understood generally that the profits are made on the medium numbers, and in making up supplies for retailers a general assortment is wanted and the extreme numbers are contributed *pro rata* to the profits of the middle numbers. I had a customer, for example, who made extensively bags for wheat, grain bags, who always wanted 8's or 10's. I would occasionally supply him, according to the condition of my stock, but would not engage to supply him regularly at my stock price.

400 X Q. There isn't much, if any, profit, then, on the numbers below 12 or above 100 if those numbers are sold alone without intermediate numbers at the stock prices for all numbers?

A. That's my impression. At the time I speak of, 30-odd years ago, there were some manufacturers who had, it might be considered, a rather extensive Southern trade which demanded more especially coarse numbers, and these were the most costly, belonging to the highest range of invoices sterling value. I did not covet that trade much, but directed my attention more especially to the numbers required by sewing machines of every class and description. I kept very closely to my stock prices, and thereby realized a better profit than my competitors who were supplying a Southern market more extensively.

753 401 X Q. Do you think that any wrong is committed on the customers or public if a manufacturer sells all his spool cotton at a uniform price per dozen, irrespective of the numbers of the thread that are purchased, although such numbers above 100 are only three-cord, while those below 100 are six-cord?

(Objected to as incompetent, irrelevant, and immaterial because it appears that witness was agent for a house making representations to the public by its labels similar in kind to the representations made by complainant- herein.)

A. At the time spoken of, 30 years ago, there seemed to be no question. It was generally understood by the trade, and the question was never asked. They had the testing of the article, and didn't buy a pig in a poke. They knew what they were buying. The question was never asked in regard to its component parts at all, nor for ten years afterwards I never heard the question raised until the suit in Boston between George H. Stewart, of Philadelphia, and the bankrupt clerk in Boston. I don't know his name, and therefore no wrong was committed, in my opinion. No wrong was imagined or contemplated as far as I ever knew, and I would

here observe that the fact of a three-cord or six-cord thread doesn't involve the exclusive value of the thread at all. You may have a three-cord thread very much superior for sewing-machine use to a six-cord thread, which may cost more but may be worth less, and the other may do work for which the last is useless and worse than useless.

402 X Q. Do you mean to say by your last answer that a three-cord thread is better for some purposes than a six-cord thread? If so, for what?

A. It is frequently much better than a six-cord thread. If in making a six-cord thread one of the six strands breaks and the operator is not very attentive to discover the break, the result is an imperfection. The six-cord is liable to this six times more
754 than the three-cord, more liable to imperfections, and if not carefully and properly tied or knotted will cause the breakage of needles in the sewing machine and the unnecessary detention in the operation of the machine loss of time, and imperfection of sewing by the machine and the expense of replacing a broken needle in the machine all of which I have explained in the previous testimony; hence the superiority of the machine to hand sewing in the quantity of work produced per day is seriously impaired.

403 X Q. In which numbers of six-cord thread are the foregoing-described effects most likely to manifest themselves—in the highest numbers or the lowest numbers?

A. Well, that is impossible for me to say. They are all liable to the same exigencies and emergencies. It is a general rule applicable to all.

404 X Q. Don't you think the liability to breakage and imperfectly knotted strands would be much more likely to occur if thread was attempted to be made in the numbers higher than 100 of six cords?

A. That involves the knowledge of a manufacturer, which I cannot attempt to express an opinion about myself. Perhaps you are not aware, or it has entirely escaped your observation, if you are aware, that manufacturers are very particular in regard to the various descriptions of staple to be used for certain numbers of thread. For example, they have Uplands, long and short staple; they have Sea Island, first quality and stained; they have Egyptians, Pernambucos, East India cottons, and various other grades of cotton, and these vary very much in value. As an exporter of raw material I have bought Sea Island, stained, at 6½ cents a pound, and clear Sea Islands at 80 cents, while fair Uplands, bowed Georgias, Savannah cotton, Alabama, Mobile, compressed, and Surats were at 10 to 12½ cents; a great deal depends in the quality of the thread, not only upon the quality of the staple, but upon the good judgment of the manufacturer and the superior qualifi-
755 cations and attention of the operatives and the condition of the machinery employed in producing the yarns and the threads in the various stages of manufacture.

405 X Q. Are you prepared to say that six-cord thread of No. 80,

if made from the same staple as three-cord No. 80, is a better thread than the three-cord No. 80?

A. It ought to be. I can't say that it is.

406 X Q. Would you make the same answer in regard to six-cord 100 as compared with three-cord 100?

A. I make the same answer as regards all thread.

407 X Q. Why do you say that the six-cord ought to be better if you don't know whether it is?

A. It requires great care in the manufacture, greater care, as I have before described. If you have a slovenly superintendent, with slovenly workers and machinery, you cannot produce the article satisfactorily as compared with those who possess a higher degree of intelligence, more attention, strict subordination.

408 X Q. Do you think that it requires more care and attention to make good six-cord thread than to make a good three-cord thread?

A. Unquestionably.

409 X Q. Suppose only the same care and attention was used in making six-cord thread of high numbers above 100 as was used in making three-cord thread of the same numbers, which do you think would be likely to be the better thread?

A. Well, I have stated that as a general thing the six-cord thread would be better than the three-cord thread; that is an old question revived.

410 X Q. Don't you know of any uses for which a three-cord thread is better than a six-cord?

A. I cannot say that I do at present.

411 X Q. How about embroidery work where soft thread is required.

A. That is entirely different; floss cotton is used in that case; the thread is not twisted at all.

412 X Q. Didn't you know that high numbers of spool cotton were used for embroidering purposes?

756 A. That is what we call tambouring; it is not embroidery in the strict sense of the word. The lower side of the fabric in the Grover & Baker machine used to be exhibited as embroidery, because it was the fine thread that was shown on the lower side of the fabric, and the fine thread being doubled showed the figure more distinctly, and if colored showed it deciedly more distinctly.

413 X Q. Did you know that three-cord thread, especially in the high numbers, was preferred on account of its softness to six-cord thread for tambouring or other forms of embroidery?

A. Well, I have no doubt of it.

414 X Q. It would be natural to suppose so, would it not?

A. I have already said that the floss cotton is preferred to both the three and six cord, the floss cotton which is four or five ply, but is flatter, not twisted.

415 X Q. Don't you think that three-cord thread would be preferred to six-cord for any purpose for which softness rather than strength was desired?

A. It might be; it's a matter of taste.

416 X Q. You wouldn't undertake to say, would you, that for such purposes the three-cord is not the better thread?

A. No; it's all a matter of taste. I never advised a six-cord up to a hundred; it was carying the thing too far.

Adjourned to December 28th, 1886.

757 NEW YORK, *Dec. 28th*, 1886—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of cross-examination of ALEXANDER KNOX:

417 X Q. Referring to the specimens of the Orrs & Macnaught's spool cotton contained in Defendants' Exhibit No. 48, and referring to the fact that each of the spools bears the words "Orrs & Macnaught best six-cord, warr'd 200 yds.," in addition to the number of the particular spool, please state whether, in your opinion, the said label would be taken by customers as a representation that the thread of the particular spool was in fact six-cord or only that the Orrs & Macnaught thread in those numbers most generally known and used was six-cord.

(Same objection as to 401 X Q. and as leading and as not warranted by the direct.)

A. Please read that again slowly. I can't comprehend the whole of that compound question.

(Question re-read.)

A. (con.). I have heretofore stated, I think more than once, that at the period alluded to my opinion is that when parties had a desire to know distinctly and put the question to me, how many cords a particular number consisted of, I at once gave them the fact whether it was six, four, or three, according to the question and the number asked for; beyond this I can't express any opinion.

418 X Q. Do you mean to be understood as saying that you don't know whether purchasers would regard the words "best six-cord" on spools as a representation that the particular spool contained six-cord thread?

(Same objection.)

758 A. I do not mean to say what they understood, but I do mean to say that if they thought they had been misunderstood they always had the privilege of returning the article if they were dissatisfied with the cotton, and I do not recollect a single instance of such an issue being raised or objection made.

419 X Q. Do you mean to say that you never considered the question whether the words "best six-cord" on the labels related to the thread on the particular spool or only to the general run of the thread which was most popularly used?

(Same objection.)

A. That is what I have repeatedly said, I think, in my testimony, or I mean to say that the idea of the question never occurred to me; never was raised. I have repeatedly said in my testimony in regard to the first part of the question as to the constituent portion of the particular spool of which the words quoted were used, and therefore I have always said in regard to the latter part of the question, after the word "or," the idea therein embraced is the one I had always entertained, that it was a distinctive general designation and not a distinctive particular designation.

42 X Q. Do you think that the fact that the higher numbers of the Orrs & Macnaught thread (which were not in fact six-cord) bore the label in question, having the words "best six-cord," had any effect in promoting the sale of those high numbers?

(Same objection.)

A. I cannot say. Other threads of that class, as far as I recollect, were subject to the same criticism. This I have repeatedly, I think, in my previous testimony stated.

421 X Q. You spoke of some suit in Boston by George N. Stuart against some clerk (whose name you did not remember), in which suit I understood you to say that the question was raised by
759 the defendant that the use of the words "six cord" on spools that were not in fact six-cord was improper. Do you remember what the result of that suit was?

A. I never knew, and I don't know whether it was the defendant or the complainant; I don't know which. All that I heard about that case was hearsay. I neither know the title of the case nor who was defendant or complainant, nor the nature of the case, nor the question in dispute. I did hear that in the legal contest that question had been raised, and it was the first instance I ever knew of its being so raised. I have stated it before. It is all in the testimony I have given, as far as I know anything in regard to it. If you wish me to go over the whole thing again I will do so; all that I know now.

422 X Q. When you heard that the question had been raised did the fact alter your opinion upon the propriety of the course which you had previously pursued?

(Same objection.)

A. I never gave it the least thought. I was entirely unconscious of pursuing any course derogatory. The hearsay testimony, which I think was from the lips of George H. Stuart, was very commendatory on his part to the character and reputation of my thread, as given in the Boston court.

423 X Q. Was it the Orrs & Macnaught thread which was in controversy before the court in the suit referred to?

A. Not at all. As I understood, it was the George H. Stuart thread, and several of the witnesses examined in that case had expressed themselves so favorably as to the quality of the Orrs & Macnaught thread that he said that if I had been there I would have been very much pleased and would have had cause to be proud

to hear it. The Rev. Dr. John Hall was present at that conversation, I think. I don't suppose he would recollect it; it was 20-odd years ago. I afterwards saw some of that Stuart thread, a
760 large quantity of it, when advertised to be sold at auction in an upper loft in a building on Park place, New York, and some of it was actually nine-cord.

424 X Q. How did it happen that the Orrs & Macnaught thread was spoken about by the witnesses in that case?

A. I certainly do not know. I am sure I never inquired.

425 X Q. Is it a fact that notwithstanding the question had been raised, as you heard in that Boston suit, you still continued to regard the use of the words "best six-cord" as a general designation of the general run of the thread and not a distinctive particular designation of the particular thread on a given spool?

(Same objection.)

A. When we consider that particular period of time, about 25 years ago, I think it was about the same as the difference between the Pope and Galileo with regard to the question whether the sun or the earth moved, and therefore questions ought to be answered in regard to the particular circumstances that may have existed at the time alluded to. For example, the marvelous and comparatively mysterious discoveries of recent time must always be viewed in regard to the knowledge existing in regard to the facts at the time mentioned. The telegraph, the electric light, both of them, ask a man 30 years ago in regard to either of them and it would be the same as asking me now in regard to these matters now being investigated or testified to. I doubt not you have heard of the sneering manner in which the courtiers of the Spanish court spoke of the discovery of America by Columbus upon his return from the newly discovered land. They said that anybody might have done that, and were amazed when he afterwards asked them to make an egg stand upon end, and on their astonishment, while they were attempting to do that thing without success, he took the egg
761 and dashed it on the table and it stood at once. This is the subject of a very nice painting by an eminent one of the old masters.

426 X Q. I don't think you quite understood my question; in your answer to the 419 X Q. you said in regard to the meaning of the words "best six-cord" on the labels and as to whether you regarded those words as relating to the thread on the particular spool or only the general run of the thread that was most popularly used that the idea embraced in the question after the word "or" "is the one I had always entertained; that it was a distinctive general designation and not a distinctive particular designation." What I want to know is whether the fact that you heard that the question had been raised in the Boston suit caused you to alter your opinion or idea upon that matter.

(Same objection.)

A. Not at all; haven't altered it yet in regard to that matter at that time.

427 X Q. Did you retain the same opinion or idea during all the time that you were in the thread business?

(Same objection.)

A. I did so then and do so still.

428 X Q. In your direct examination you used the term "hard twisted" in describing some kind of thread; please tell us what those words signify as a designation of thread.

A. They signify excessive twist, unnecessary twist, if you please; unnecessarily excessive would express my idea better, but that depends upon the uses for which the thread is intended. If the thread is intended for hand-sewing exclusively a comparatively harder twist, in my opinion, is better than a comparatively softer; but if for machine-sewing exclusively then a softer twist is decidedly preferable. By a softer twist I mean less twisted or fewer turns to the inch.

762 429 X Q. In your direct examination I understood you to say that the directions given you by Orrs & Macnaught for introducing their thread were to sell it at five per cent. below the price of Coats' thread; why was that?

A. I never said that; it was five cents per dozen; it was that at that time; I never asked them why.

430 X Q. Did you know any reason why their thread should be put upon the market at a lower price than Coats'?

A. I would suppose a reason, which I have stated in my former testimony; I could, in fact, suppose two distinct reasons, namely, they were manufacturers of their yarns, which Coats were not; they were, as I have stated before, giving fully 20 per cent. less turns to the inch because their thread was intended for machine use more especially and cost less in manufacture, as Coats naturally would have to pay the yarn manufacturer's profit, and, as remarked, the turns on the inch, being 20 per cent. less, would turn out 20 per cent. more length; both are very cogent ideas in my estimation.

431 X Q. Do you think the fact that Coats thread was a very popular thread and the Orrs & MacNaught thread unknown under that name in this country had anything to do with the matter?

A. It might; it would be a third reason then.

432 X Q. You spoke of the R. F. & J. Alexander thread as having been made earlier than Orrs & Macnaught's; prior to 1855 did R. F. & J. Alexander put up thread on spools or only in balls?

A. Long prior to that on spools, years—many years—prior to that, for which they had specific demands in Louisiana, Mexico, and South America, generally.

433 X Q. Was the R. F. & J. Alexander thread imported into this country on spools prior to 1855, except in Louisiana?

A. I cannot say.

763 434 X Q. I understood you to say that on one or two occasions, perhaps more, you got some of the R. F. & J. Alexander thread on spools. About how much of it was there that you so received?

A. I only recollect one occasion on which I received in a package containing six tin cases of a hundred dozen each. There was one tin of R. F. & J. Alexander labeled thread from No. 80, I think, to 130 assorted.

435 X Q. Did you understand that shipment to have been an accidental one?

A. I did so.

436 X Q. Aside from that accidental shipment, did you ever know of the R. F. & J. Alexander thread being upon the market in this country, outside of Louisiana?

A. I have no knowledge of that whatever. For some time, two or three years, perhaps, I don't know when, the invoices received here and entered at the custom-house were consignments by R. F. & J. Alexander & Co. I think after some time I mentioned that it would be better to have the invoices bear the same name as the spools, Orrs & Macnaught, as it was a fact that they were manufacturers and had long been partners of the Alexanders, some of the latter having died and some retired from business. The works were then known as the Molendinar works. This is the name of a little creek that flows into the Clyde at that point.

437 X Q. Do you know anything about any importations of the R. F. & J. Alexander thread into Louisiana, except by hearsay?

A. All my information is by hearsay from various individuals.

438 X Q. Can you name any other thread manufacturers than Orrs & Macnaught who embossed the heads of their spools between 1855 and 1874?

A. I do not know.

439 X Q. Can you name any one who did so prior to 1855?

A. I do not know.

764 440 X Q. Do you think that anybody, other than Orrs & Macnaught, did so at any time, though you cannot give their names?

A. I do not think anything about it. I cannot think for or against. I do not know.

441 X Q. You have no memory on the subject?

A. No memory upon that point.

442 X Q. Did anybody succeed you as agent for the Orrs & Macnaught thread?

A. Nobody; several desired to do so, but Orrs & Macnaught said if I retired from the agency they would retire from the market. They repeatedly thanked me for the manner in which I had managed their business, and expressed a hope that my health would so improve as to enable me to continue.

443 X Q. State, as nearly as you can, when spool cotton with a label bearing the name of J. & R. Clark first became known to you in this country.

A. Well, as near as I can recollect, I should think about 1858 to 1860; somewhere about that time.

444 X Q. About how long did thread with that name continue to be sold in the American market?

A. Really I could not say. Perhaps four or five years. I don't know.

445 X Q. Can you give a description of the labels used on the J. & R. Clark spools?

A. Well, I shall have to refer to this exhibit here. All that governs my recollections now in regard to that thread is simply this: When I was in Paisley, in the autumn of 1854, these young men were out of business, James and Robert. When dining with them at their father's and meeting them at other times I was informed that they intended to go into business as spool-cotton manufacturers. Their father told me he intended to hire a part of a mill and put them in trade again. I was informed he afterwards did so, and subsequently they erected a mill and employed Alexander King, Jr., as a travelling agent in Great Britain, and afterward sent him to New York, where he still remains;
765 at least he resides in Orange, New Jersey, and does business in New York. He was attempting to introduce the thread here, and while so engaged George A. Clark & Brothers purchased the new mill from their cousins J. & R. Clark, and thus threw Alexander King out of business, but I understood recommended him to Ashworth & Co., thread-makers in England, whose thread he attempted to introduce here, but subsequently he retired, or failed, or ceased, I don't know which; he discontinued, I would say. He told me he scarcely paid expenses. He had a partner in the enterprise named Clark, of Hartford, Connecticut, who had been traveling in Europe, where he met J. & R. Clark, made their acquaintance, and for some years remained as a partner of Alexander King in the importing and agency business, with another partner whose name I don't recollect.

446 X Q. Do you remember seeing any of the J. & R. Clark spool thread while it was on the market in this country?

A. I have seen it. I saw some of it here; I saw some of it in Grover & Baker's, I think.

447 X Q. Can you describe the labels which were used on it?

A. Not farther than to say that it was a black and gold label similar to mine and to Coats' and to Merrick's, I think, and you may say spool cotton in general.

448 X Q. Do you remember the label on the reverse end?

A. Alexander King, I think.

449 X Q. Do you remember anything about the lettering or position of the numbers on the black and gold label referred to?

A. I cannot testify as to that; I have not a distinct recollection.

450 X Q. Do you remember whether the lettering and numbering was black on a gold ground or gold lettering and numbering on a black ground?

A. I do not.

766 451 X Q. Did you see a specimen of spool cotton with a

label bearing the name of J. & R. Clark on it in this office during the progress of your direct examination?

A. I am pretty sure I have.

Adjourned to January 4th, 1887.

NEW YORK, *Jan. 4th*, 1887—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of cross-examination of ALEXANDER KNOX:

452 X Q. When did Alexander King come to this country as agent of J. & R. Clark?

A. Really I cannot say positively; I have no positive knowledge of that fact.

453 X Q. State the time, as nearly as you can, when you first knew of his being here.

A. I can't very well do that; it was some time during the war; it was in those four years from 1861 to 1865.

454 X Q. Can you state approximately the amount of your sales of the Orrs & Macnaught spool cotton in the first year that you introduced it?

A. I cannot; the records of the custom-house would show; it is over thirty years ago; I cannot state from memory.

455 X Q. Can you state approximately the amount of sales of the Orrs & Macnaught spool cotton during the years 1857 or 1858?

A. I cannot.

456 X Q. Can you during 1859 or 1860?

A. I cannot during any year.

457 X Q. Not even during the last year?

767 A. Not even during the last year.

458 X Q. Can you state approximately what your average annual sales of the Orrs & Macnaught spool cotton were during the period of your agency?

A. I cannot; these are statistics which are on record at the custom-house and which I do not trouble my memory to retain. I have been out of business 12 or 15 years, and it is preposterous to suppose that I would retain in my memory such details as these, as those involved in the questions propounded. In my opinion it is an absolute absurdity to think it.

459 X Q. In your 24th answer you spoke of the late A. T. Stewart having been "engaged in an enterprise" and that your friends said they "did not want to enter into competition with him." Am I correct in supposing that that was one of the reasons that induced your giving up of the Orrs & Macnaught agency in 1874?

A. I cannot say whether you are correct or not correct. The reason I gave it up was on account of my health; the manufacturers earnestly desired that I should continue.

460 X Q. Was the Stewart enterprise and the fact that your friends said that they did not want to compete with him an additional reason for giving up the dealing in the Orrs & Macnaught spool cotton?

A. The sole reason for giving up the dealing in spool cotton was the state of my health; I happened casually to mention the idea suggested in that 24th question or answer; please to read it. (24th question and answer read to the witness.) Now, the answer having been read, I now simply state that having known A. T. Stewart for a very long period of time personally and various of his mercantile enterprises and operations from time to time during a long period of years, having known of his action as a merchant appraiser in contests with custom-house officers and importing merchants,
768 having also acted as a merchant appraiser myself on invoices of J. & P. Coats, I from time to time, in correspondence with my manufacturers, Orrs & Macnaught, mentioned the operations of competing agents of spool cotton, and amongst other instances of competition stated from time to time the facts which came under my observation in the operations of A. T. Stewart to establish a demand for his particular thread, among which were such instances as the following, viz: Placing an open package of thread in the suburbs or at the junction of two roads in Louisville, Kentucky, from which passers-by were invited to help themselves to samples or quantities of the thread without money and without price. Another instance of his efforts to establish a demand, which comes to my knowledge from hearsay, was that in various instances he employed two females to travel together and use every legitimate effort to distribute, circulate, and commend to public patronage the very superior merits of the great A. T. Stewart & Co.'s thread. I did not mean to confine it to two females, but various parties of two females. Now, these then novel and extraordinary efforts to establish a demand for a particular thread as they came to my knowledge were naturally reported to my manufacturers, and it was in reference to these particular facts and the additional one of several other manufacturers contemporaneously and unanimously resolving to carry six-cord up to 100, inclusive, and engaging in the American manufacture of American threads, or at least winding or spooling here, in which description of enterprise I did not wish to engage individually, and as I had never employed traveling agents, that I inferred that in all these various items, but above all in regard to the state of my health, induced me to retire positively and I supposed entirely from business at that time. There were various individuals and firms who desired to succeed me in the agency, and I communicated to the manufacturers, Orrs & Macnaught, the propositions
769 made by several applicants for the agency, or that they would send out a gentleman of their own selection to succeed me in the agency.

461 X Q. Can you state approximately the date or the time when George A. Clark bought out Messrs. J. & R. Clark's mills and established the sale of the George A. Clark spool cotton in this country?

A. I cannot approximately.

462 X Q. Was it before or after the civil war?

A. Oh, it was before the civil war. I think it was soon after my return from Europe; I think it was a year or two after.

463 X Q. Then it was somewhere from 1856 to 1858?

A. Somewhere about that, I suppose.

464 X Q. Excuse me for asking the question, but please tell me whether your eyesight is perfectly good now.

A. It is entirely satisfactory to myself, I am very thankful to say.

465 X Q. I place on the table before you a spool of spool cotton with the label towards you and perhaps four feet from your eye. Can you read the name on that label at that distance?

A. I can't read any letters there. I can see that there are letters there, but I can't read them. I can read the number in the center. No. 30 I see very distinctly, I think. As far as I know there are only two parties that have used or manufactured that label—only two firms. Am I permitted to handle that?

(Defendants' counsel requests the examiner to note that the spool shown the witness is one of John Clark, Jr., & Co., white thread on black spool, No. 30, six-cord thread.)

466 X Q. Can you tell me whose spool it is which is on the table before you?

A. I cannot at this distance. You have not allowed me to see it within the scope of my vision, which is very satisfactory to me.

467 X Q. Who were the firms who alone, so far as you know, use the label that you see on the head of that spool?

770 A. The firms in the legal dispute of 1856, in which my affidavit was recorded and has been used in this examination.

468 X Q. You mean the two Clark firms?

A. Yes. There are more than two Clark firms, however; there were four, I understood; I think there were four. I mean two of the four.

469 X Q. Do you think from the appearance of the label on that spool that the spool is either one of John Clark, Jr., & Co.'s or of J. & J. Clark's?

A. I do.

470 X Q. But you can't tell which because you can't read the names?

A. I can't tell which with the naked eye because the distance is 40 or 48 inches that I am allowed to look at it after my solicitation—mysterious examination.

471 X Q. I now place another spool in the same location on the table with its label toward you and ask you if you can tell me whose spool and label you judge that to be from anything in its appearance.

A. I judge it to be Orrs & Macnaught, No. 30.

472 X Q. Why do you think it is Orrs & Macnaught?

A. Because my mind governed by my vision leads me to suppose that to be the case. To close my eyes I certainly wouldn't think so. I wouldn't know what to think then.

473 X Q. What makes you think that the spool before you is one of Orrs & Macnaught's rather than that of any other manufacturer?

A. I have already answered the question.

474 X Q. Is there anything distinctive in the appearance?

A. Apparently about as much as there is between you and me.

475 X Q. Well, we look quite different, do we not?

A. I think that is a silly question.

476 X Q. Won't you kindly tell me what there is in the
771 appearance of the spool before you which makes you judge that it is an Orrs & Macnaught spool?

A. This examination is childish in the extreme. I want to measure the distance exactly; it is about 50 to 60 inches now.

(Question re-read.)

Why, that head is so stupid that I can't impart it to him at all; it is clear to my own mind because of my vision, but he is determined not to understand and I can't impart it to him.

(Complainants' counsel requests the examiner to note what the spool is which has been before the witness as the subject of the last six questions.

The examiner notes that the spool is one of George A. Clark's best six-cord No. 30 white thread.

The witness now remarks that when the spool is put on end it appears to be a little larger than Orrs & Macnaught's, and that it may be Merrick's.)

477 X Q. Will you please now take the spool in question in your hand and look at the label and tell me whose spool it is?

A. Clark's O. N. T.; George A. Clark's No. 30.

478 X Q. Now, I place another spool on the table with the label towards you and ask you if that spool is placed at about the same distance as the others from your eye.

A. No; it is not; it is placed about half the distance, I think, and is J. & P. Coats'; that is about 36 inches; the other was 60 inches. I can read the letters on this distinctly.

479 X Q. What is the distance of the Coats spool from your eye?

A. About two-thirds of the distance of the other spool from my eye.

480 X Q. Please give it in inches.

772 A. Well, I call this 36 inches and the other 54 inches—that is, just two-thirds, or — will call it 40 inches or 60 inches, just as you please.

481 X Q. The spool was placed at least 40 inches from your eye, was it not?

A. I don't know that it was at least 40; Mr. Witter thought it might be 40.

(Complainants' counsel asks the examiner to note what the spool last placed before the witness was.

The examiner notes that the said spool was one of J. & P. Coats' best six-cord No. 10 white thread.)

482 X Q. I now place another spool on the table in the same location as the first one with the label towards you. Can you tell me whose spool and label that is?

A. Really I cannot. I think it looks like J. & P. Coats'.

(The examiner notes that the said spool is one of J. & P. Coats' best six-cord No. 30 white thread.)

483 X Q. I now place another spool on the table with the label towards you and ask you what that spool is.

A. You are getting beyond the range of my vision there; why don't you put it down here where Coats' was put? I am not going to submit to such treatment; the idea that a gentleman eighty years old, or within one month of it, should be treated in this way; I am not going to remain here unless I am treated like a gentleman.

(The witness withdraws from the examination-room.

Complainants' counsel requests the examiner to note what the spool is that was last placed before the witness, and also whether the said spool was not placed in exactly the same location as the
773 last spool of Messrs. J. & P. Coats', concerning which cross-question 482 was asked the witness.

The examiner notes that the said spool last placed before the witness was one of the Merrick Thread Co.'s best six-cord No. 30 white thread, and the examiner also notes that the said spool was placed in substantially the same position on the table that the second spool of J. & P. Coats' exhibited to the witness was placed in, irrespective of the position of the witness.

Complainants' counsel requests the examiner to state on the record whether during the examination in regard to the two last spools the witness changed the position of his chair, or whether, so far as the examiner can state, the witness examined the two spools from any different position in his chair.

The examiner states that, to the best of his recollection, the witness did not change the position of his chair during the examination in regard to the two spools referred to, but that the witness at different times leaned forward or leaned backwards in his chair, so that the distance between his eye and the spool placed upon the table varied at times from about a foot to a foot and a half or two feet, in the examiner's opinion; whether the witness was leaning forward or leaning backward when he examined the last two spools exhibited to him and expressed his opinion as to their identity the examiner cannot pretend to say.

Complainants' counsel now restores the spools that have been exhibited to the witness to their places in Complainants' Exhibit Box Comparative Samples.

Complainants' counsel further requests the examiner to state whether the witness has not been treated with entire courtesy,
774 and whether there has been any cause for his apparent anger other than the nature of the questions asked.

The examiner states that the witness himself appears to be irritated, as complainants' counsel has suggested, by the nature of the questions that were put to him, as also seems apparent to the examiner from the answers that the witness has himself given; for

example, the examiner refers to answer to 476 X Q, from which it appears that the witness thought that counsel for complainants did not want to understand him. As far as the examiner himself can judge, the questions asked the witness have been courteous. The examiner deems it proper to state that the witness is an elderly gentleman, about eighty years of age, and this may perhaps account for his irritation.

Defendants' counsel objects to the questions and answers from 464 to 483, inclusive, as irrelevant and incompetent and immaterial and for the reason that the tests to which this witness' eyesight was subjected were not such tests as customers or dealers are, in the practical marketing of the goods or otherwise, ever subjected to, even when the eyesight is good.)

NEW YORK, *Feb.* 15, 1887—1.30 p. m.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of cross-examination of ALEXANDER KNOX:

484 X Q. Is it your idea that if the name of the manufacturer is as plainly printed as ordinarily done on the paper label of a spool that no similarities of construction in the spool or arrange-
775 ment of lettering or devices on the label is likely to deceive ordinary retail purchasers who give only that degree of care and attention to what they are buying that such purchasers do in fact give?

A. Ordinary retail purchasers are, in my opinion, never deceived; they always know what they are buying and are very particular and never take anything but what they want; it is, in my opinion, impossible to deceive them; I never knew a class of people more particular than dealers in spool cotton, of retail spool-cotton buyers, retail spool-cotton dealers. I don't mean the consumers, I mean the retail buyers and sellers; the retail jobbers.

485 X Q. I think from your last answer that you have not understood the class of persons that I have intended to refer to by the term "retail purchasers." I meant the ordinary customers who buy at retail from retail shops for their own use one, two, three, or more spools at a time. I now ask you whether it is your idea that such customers would be likely to be deceived by the similarities of construction and ornamentation of spools and similarity of color and arrangement in labels, even though the name of the manufacturer might be printed on the label with the ordinary degree of prominence.

A. The same remark I applied to the former class I think would apply to the class of retail consumers, which means family consumers for domestic use. The gentleman in his question has more particularly defined the class to which he previously alluded, and the class which he has the more particularly defined are the most difficult to change. They rely, as far as my judgment goes, most particularly upon the name of the manufacturer upon the label, and in support of this opinion I now express I would name as an instance

J. & P. Coats, where they have retained the J. & P. Coats, although the J. Coats has been dead long since, and it is really Peter and Thomas Coats. I suppose it is about forty years since the James Coats died who introduced the thread at first. Thomas Coats is dead now.

776 And being further examined by W. C. WITTER, Esq.:

486 R. D. Q. Do you now remember any other makers of spool thread who ornamented the wooden rim of the spool outside the label with some fanciful design except J. & P. Coats and your firm of Orrs and Macnaught?

A. I cannot distinctly recollect any other manufacturers that did so at present.

487 R. D. Q. State whether it has been the practice of spool-thread manufacturers to sometimes put the name of large users or sellers on their thread on the reverse label of the spool instead of the name of an agent, as, for example, Grover & Baker's name, and as illustrated by some of the spools of Clark's thread in Defendants' Exhibit No. 48?

(Objected to as immaterial and as leading.)

A. At an early period, very generally the practice.

488 R. D. Q. You have referred in your testimony to a period during which the Coats people sent their thread to Thomas Mellor, in Philadelphia, putting his name upon the label instead of their own. Is it your recollection that this Mellor label was a black and gold label?

A. I haven't any particular recollection in regard to the appearance of the thread because I never had any occasion to handle it. I have always understood that they sold the thread to him, but whether they sent it to him or delivered it to his agent in Liverpool I do not know. I always understood that he ordered the thread annually or semi-annually; that was anterior to the introduction of the thread by James, the son, in 1840.

489 R. D. Q. Is Thomas Mollor living?

A. No; he died some years ago, as far as I am informed.

490 R. D. Q. State whether it has always been a difficult matter to introduce a spool thread with a new name upon it and
777 mention some of the steps you have known to be taken to introduce such new thread, omitting what A. T. Stewart did, because you have already described that. State as much in detail as you can recall what you and your company yourselves did at the time of the introduction of your thread to get the public attention.

(Objected to as leading.)

A. Without carefully making out a schedule from general recollection I would say the failures have exceeded the successes; I recollect very extraordinary efforts were made by a company styled John Dick & Son, of Glasgow, who had been in the employ of John Clark, Jr., & Co., of Glasgow, previously many years; I recollect an

effort was made by Robert Renfrew to introduce a new thread without success; also a man named Smith—I forget his partner's name—who kept a store in Pine street; he disappeared after a few years; there was the effort of Geo. H. Stuart, of Philadelphia, and the effort of a brother-in-law of Mr. Stuart named Dr. Scott, and his sons, to introduce a thread named Phillips' thread; these were all foreign attempts, attempts of foreign threads; as to American attempts, there was a Saco thread in Maine, and the Hadley threads, and the Holyoke threads, glacé thread, and this Mt. Holley thread in New Jersey, I forget the name of the firm; those were only a part of the attempts that came under my knowledge; there were many others; there were French threads that I can't name, Belgian threads, and English threads; I now recall the New Jersey thread as that of Semple & Sons, who was more recently under the management of Geo. H. Stuart; we gave away samples liberally, tramp, tramp, tramp with samples, talk, talk, talk, talk, test for strength by doubling and pulling the threads till one broke, the one which did not being the victor; we advertised in a hundred papers at a time, got editorial favorable notices written in the papers as far as we possibly could, and all other fair and legitimate measures
778 to create a call and secure a part of the trade. I never employed travelling agents; I took that part myself at first.

491 R. D. Q. In all these efforts was the principal and important point to have your name of Orrs & Macnaught and your own name as agent ever before the public on the goods, on the packages, and in the advertisements?

(Objected to as leading.)

A. Always before the public.

492 R. D. Q. Are your present relations with the Coats people of a friendly character?

A. I never knew that they were at any time of an unfriendly character.

493 R. D. Q. I suppose that you mean then that your relations with the Coats people have always been and are now of a friendly character?

(Objected to as leading and as calling for a mere conclusion and not at all warranted from the previous answer. Question withdrawn.)

494 R. D. Q. State the character of your relations with the Coats people in the past and the present; whether they have been friendly or otherwise.

(Same objection, as the previous question has been read in the hearing of the witness.)

A. I never knew of any act on the part of them or us as exhibiting unfriendliness; I and my parents have entertained members of the Coats family at various periods with accommodations, as one friend would accommodate another, in the way of eating and sleeping and drinking, and they have so entertained my parents on the

other side and myself here, and I think within the last two or three years I met him in the city, and he called to see me and my family at my residence; I also met Sir Peter here within the last three or four years, I think, when he was here with his daughter.

495 R. D. Q. Have you any interest whatever in this suit or the issue of it?

779 A. None whatever.

496 R. D. Q. Have you any acquaintance with the defendants except such as you have made while your testimony was going on by their being present?

A. None whatever.

497 R. D. Q. Has your cross-examination in this case been the cause of some personal annoyance to you?

A. Some portions of it have not been pleasant at all. I might say that if I had been subpœnaed or called upon by the opposition to have testified I would have testified just as I have without fear or malice. I suppose a person cannot be supposed to give his time without due compensation. I said the usual compensation for loss of time, if you please. Add that, because I added that myself. Had the examination been limited to one or two days, as I supposed it would, I would not have expected; I would not have entertained the same ideas or views in regard to the loss of time, and knowledge, which is power, is worth something. The annoyance I have experienced now and then has originated in what I conceived, it may be misapprehensively, to be an attempt or attempts to entrap or ensnare the witness into motives and feelings in giving testimony which he considered depraved and dishonorable. That is all I have to say. I may have been mistaken. I couldn't stand it. I couldn't help opposing such a demonstration.

And being further cross-examined by F. H. Betts, Esq.:

498 R. X Q. Do you know whether the labels which were used on the Mellor thread between 1830 and 1840, which bore the name of Thomas Mellor, were originally put on such spools by the Coats' or by Mr. Mellor's agent?

A. I have no doubt whatever that they were put on by Coats at their manufactory.

(Answer objected to as incompetent and irresponsive.)

780 499 R. X Q. Do you know?

A. I do know, and believe that the labels were put on at Coats' mill. I have not the slightest doubt about it.

500 R. X Q. How do you know?

A. That when I sit, I sit; I know that. When I walk, I walk; I know that. I am satisfied that I know. If the gentleman can't understand let him go elsewhere; I can give him no further information. I fail to understand what he does mean.

501 R. X Q. Did you see any of such labels put on at the Coats mill?

A. I didn't see any labels of any kind put on at Coats' mill.

502 R. X Q. Did anybody ever tell you who put the Mellor labels on?

A. I never asked.

503 R. X Q. In your 490th answer you mentioned the methods you adopted for bringing your Orrs & Macnaught thread into public notice. Did all the thread manufacturers or agents, whether their threads were established or not, continue to use the same methods?

A. I don't know. I never asked any of them; but I do know when James Coats, the son, and Andrew Coats, the brother, were introducing the Coats thread I witnessed similar efforts by them which I or anybody else would naturally pursue to obtain the same object.

ALEX. KNOX.

Subscribed and sworn to before me this 15th Feb., 1887.
W. H. KENYON, *Notary.*

Adjourned to Feb. 23d, 1887, at 11 a. m.

781 NEW YORK, *May* 18, 1887.

Met pursuant to notice.

Present: W. C. Witter, Esq., for defendants; Samuel R. Bestt, Esq., for complainants.

EDWARD A. LE PARD, a witness of lawful age, produced on the part of the defendants, being by me first duly cautioned and sworn to speak the truth, the whole truth, and nothing but the truth in the matter in controversy herein, and being examined by W. C. WITTER, Esq., of counsel for defendants, deposes and says:

1 Q. What is your name, age, residence, and occupation?

A. Edward A. Le Pard; age, 33 years this fall; residence, 558 Hudson street, N. Y., and am a wholesale and retail dealer in notions.

2 Q. Is spool thread among the articles in which you deal?

A. It is, largely.

3 Q. Both wholesale and retail?

A. Yes, sir.

4 Q. For how many years have you sold spool thread at wholesale and retail?

A. About ten.

5 Q. Have you personally sold such thread at retail over the counter to customers, as well as at wholesale to dealers?

A. Most of the time I have.

6 Q. Mention the threads that you have dealt in during these ten years.

A. Clark's O. N. T., Clark's Mile-end, Willimantic, Coats', Merrick's, Brooks'. That's about all, referring to the good qualities.

7 Q. Are you still selling all of these threads?

A. I am.

8 Q. Of which do you sell the most?

A. Clark's O. N. T.

9 Q. Of which next?

A. Clark's Mile-end.

782 10 Q. What colored labels do the principal thread dealers use for designating their best quality of thread, as a general rule?

A. Black and gilt color.

11 Q. What shape of label do they use?

A. Round.

12 Q. What do they put upon it?

A. Their name, the quality, the quantity, and the number.

13 Q. Taking all the numbers together, what appears most conspicuously upon the label, in your opinion?

A. The maker's name.

14 Q. What next in prominence appears upon the label?

A. The number.

15 Q. Mention the threads that you have dealt in, the best quality in which is designated by black and gilt labels such as you have described.

A. Clark's O. N. T., Willimantic, Merrick, Coats. That's about all I have dealt in.

16 Q. How are these threads distinguished in the market?

A. By the name they bear, principally.

17 Q. How do you know that?

A. By the experience that I have had in selling the same.

18 Q. You say "principally." What exception, if any, do you make?

A. By the trade-mark in the case of Clark's Mile-end and Clark's O. N. T.

19 Q. How do consumers designate what threads they want when purchasing?

A. By the name of the maker, in most cases, and the number.

30 Q. What do — mean by "in most cases"? Explain that a little.

A. Usually they ask for the make which they want, designating either Clark's O. N. T., Clark's Mile-end, Willimantic six-cord, Coats', or Merrick's.

783 21 Q. Are there customers who don't care what make they have and therefore do not specify any name?

A. Frequently. In such cases they leave it entirely with the person supplying the thread to give them what they choose, being careless as to which they have.

22 Q. What expense and trouble, if any, do makers of spool thread take to distinguish their threads from others?

A. They incur great expense in numerous ways, namely, by furnishing cabinets, glass signs, highly colored picture cards, counter wrappers, picture books; in each case the maker's name of thread being the most prominent in all the thing.

23 Q. Does the maker's name have an equal prominence on the boxes of thread also?

A. They do; on the top, as well as the bottom of the box.

24 Q. And is all this true of all the thread you have dealt in?

A. In every case except one, and that is Brooks'; theirs is not printed on the bottom of the box.

25 Q. Look at the exhibits which I now show you and state whether they are examples of some of the means by which thread-makers connect their name with their manufacture; those which I produce are issued by the Merrick Thread Company: Defendants' Exhibit 35, Cabinet; 36, Show-Card No. 1; 37, Show-Card No. 2; 38, Advertising Card; 39, Show-Card No. 3; 40, Ten-Dozen Wrapper; 41, Counter Wrapper; 42, Color Card; 43, Box Containing One Spool and Advertisement; 44, One-Dozen Box.

A. They all are.

26 Q. Will you please produce another sample show-card issued by the Merrick Thread Company?

A. I produce one.

(Defendants' counsel puts the same in evidence, and it is marked "Defendants' Exhibit No. 57, 1887 Star Show-Card.")

784 27 Q. State whether you have from time to time received and been familiar with samples of the above means of advertisement in your own business of thread-selling.

A. I have.

28 Q. And this is true of other makers, as well as Merrick, is it?

A. Yes, all of them.

29 Q. I notice on the Merrick Thread Co.'s spools, outside of the black and gilt label, numbers stamped in the wood of the spool; what do those numbers mean?

A. The size of the thread.

30 Q. What usefulness, if any, is there in having the size of the thread thus stamped in the wood?

A. Simply to show the number of the thread on the spool should the label be defaced or removed.

31 Q. Is it a fact that labels do get removed in handling in your business?

A. Occasionally they do.

32 Q. And it is a fact that they get removed or defaced in use?

A. They do.

33 Q. And defaced in handling?

A. Yes.

34 Q. What usefulness is there in having the number appear more than once on the wood of the spool?

A. In taking the spool into one's hands the number appears directly before you in such case.

35 Q. Do you mean whichever way you hold the spool?

A. Yes.

36 Q. You said that the black and gilt circular label in general use by the principal dealers bore something upon it indicating quality; in the case of the Merrick thread what so designates the quality?

A. The words "best six-cord."

37 Q. Which, in your opinion, is the plainer way of dis-
785 tinguishing the name on the threads you have mentioned; black letters on a gilt ground or gilt letters on a black ground?

(Objected to as incompetent.)

A. Black letters on a gilt ground.

38 Q. You say that "best six-cord" indicates quality. What does "best six-cord" mean, as you understand it?

A. Six separate strands twisted together as one thread.

39 Q. Does that make the best thread you are acquainted with.

A. It does.

40 Q. State whether, in your opinion, that is true in all the numbers that you have dealt in.

A. It certainly is.

41 Q. What numbers have you dealt in that are really "six-cord" thread?

A. From 8 to 140, inclusive.

42 Q. Whose make of thread have you dealt in that were six-cord above 100?

A. Merrick's only.

43 Q. State what satisfaction that thread has met with among consumers as compared with the numbers above 100 of other makers.

A. I have been told by those that used it that it was the best they had ever used in such numbers for strength, it not having broken a single time.

(Objected to as incompetent and hearsay.)

44 Q. What is the most desirable quality in thread of these high numbers?

A. Its strength.

45 Q. You stated that you in your business sold more of Clark's O. N. T. than any other make. State how much more than any other make; I mean approximately.

A. I sell as much of O. N. T. as I do of all the rest put together—of six-cord.

46 Q. Did you ever know of Coats' six-cord thread being desig-
nated or asked for by the stamped number in the wood?

786 A. No.

47 Q. Did you ever know of anybody's buying Merrick thread by mistake when they wanted Coats'?

A. No.

48 Q. Is it your practice when a particular maker's thread is asked for to wrap up a different maker's thread for the asker?

A. Certainly not.

49 Q. State whether, in your opinion, consumers, using such care as is ordinarily used by such people, would be likely to take the Merrick thread by mistake when the Coats thread was what they desired.

(Objected to as incompetent and because the witness has not been shown to be qualified to answer.)

A. No; not in any case.

50 Q. Why not?

A. Because it is not like it.

51 Q. Which thread is sold for the higher price—the six-cord thread or the three-cord thread?

A. The six-cord in all cases, to my knowledge.

52 Q. Do you deal in three-cord thread as well as six-cord?

A. I do.

53 Q. Where is your place of business?

A. At 558 Hudson street, New York.

54 Q. What should you say of a man who should intentionally sell Merrick's six-cord thread for Coats'?

A. I should say he was an impostor.

55 Q. Do you think a person could unintentionally do so without being very heedless?

(Objected to as immaterial.)

A. I do not.

56 Q. Would a person taking reasonable care be likely to make such a mistake, in your opinion?

(Same objection.)

787 A. I think not.

57 Q. What is there upon the Merrick thread that most prominently distinguishes it from all others?

A. The name of "Merrick Thread Company."

58 Q. How distinctly does that name appear compared with the name on other threads?

A. Just as distinctly as on all the other brands, in my estimation.

59 Q. Is it put in any unusual place or in the proper place where the name should be looked for?

A. It's placed similarly to all the others, in my estimation.

60 Q. State whether you have become in the course of your business of selling threads familiar with the difference in size and shape between the Coats and Merrick spools of thread.

A. I have, somewhat.

61 Q. How do they differ—number for number?

A. They differ in the shape of the spool; very marked.

62 Q. Have you as a dealer become able to distinguish the two in that way, without reference to any name?

A. I have in all the prominent numbers most used.

63 Q. What is the difference in shape that you refer to?

A. The Merrick is very much longer in shape.

64 Q. What are the numbers of thread that are most used? Give the result of your experience in business.

A. The more numbers you take in alters the answer to that question, but as a rule from 30 to 60, inclusive.

65 Q. State whether different invoices of white thread, from the

same maker, are of the same color or shade of white or whether they vary with all the makers.

A. They vary somewhat with all, but especially with Coats, that being more blue or blue white in my experience.

788 66 Q. Do you know of any other use, advantage, or object in having the number of the thread stamped in the wood, except as a means of readily determining the size or number of the thread on the spool?

A. I do not.

67 Q. And never heard of any?

A. No.

Examination of this witness adjourned to Tuesday, May 31, 1887, at 12 o'clock.

NEW YORK, *May* 31, 1887—12 o'clock m.

Present: W. C. Witter, for defendants; Frederic H. Betts, for plaintiffs.

The witness, EDWARD A. LE PARD, being further examined, testified as follows:

68 Q. If there are cases where customers do not ask for six-cord spool thread by the name of the maker how do they ask for it? I refer to customers who desire some particular make and not to such customers as merely want a spool of thread regardless of the make.

A. Such as in the case of Clark's they do not mention the name but the trade-mark "O. N. T." or "Mile end" or Clark's on black spools.

69 Q. How do you know that six-cord thread is the best?

A. From the fact that the makers in all cases make special mention of the fact and that customers pay the highest price to obtain the same, as it has proved to them to be the best.

(Answer objected to as incompetent.)

70 Q. How did you come to deal in six-cord thread in numbers higher than one hundred?

789 A. By having my attention drawn to the fact by Mr. H. F. Palmer that they were making all numbers six-cord up to 140, inclusive, and I knowing that six-cord was the most desirable in all numbers, I preferred their thread in fine numbers on that account.

71 Q. Of what thread do you sell the most in numbers over one hundred?

A. Brooks' glacé, called glazed.

72 Q. Why?

A. Because it is most desirable, it being glazed, and thus runs smooth, and they claim that owing to the glaze it is much stronger than soft finish.

73 Q. You have mentioned the name of Merrick Thread Company as distinguishing the thread of that company from others.

Would you mention any other peculiarities that especially distinguish it from the Coats?

A. It is numbered on the label altogether different. On the first label and the label on the other side is entirely different from Coats.

74 Q. Did you ever hear of a thread once upon the market known as the Orrs & Macnaught?

A. I did.

(Objected to as immaterial and incompetent.)

75 Q. When?

A. Several years ago; before I entered into this business.

76 Q. Did you ever know of a six-cord spool thread that did not have the maker's name prominently on the label?

A. I did not.

77 Q. Did you ever know of a six-cord spool thread that was not known in the market and to consumers by the name of the maker except to some extent as you have explained in the case of the two Clarks?

(Objected to as leading and immaterial.)

790 A. I never did.

78 Q. Which six-cord thread in numbers up to 100, inclusive, should you say, of those that you have dealt in, is the best thread?

(Objected to as immaterial.)

A. I really do not think there is any material difference in the quality of all the best six-cord threads in the market, they all being made to be the best that can be made by the several manufacturers.

And being cross-examined by Mr. BETTS, he says:

79 X Q. What other makers of thread besides Brooks' and Merrick's do you sell in numbers above 100?

A. Clark's O. N. T., Clark's "Mile-end," and Coats'.

80 X Q. Which make in numbers over one hundred do you sell the most after Brooks'?

A. Referring to those three or referring to all?

81 X Q. Referring to all you sell.

A. I should say O. N. T.

82 X Q. And which next after "O. N. T."?

A. But very little difference between all the rest; so near alike I cannot definitely answer which comes second.

83 X Q. Do you mean the second after "O. N. T."?

A. I do.

84 X Q. In your opinion, does the glazing of Brooks' thread make it any stronger?

A. Certainly it does, in my opinion.

85 X Q. In selling numbers of thread of the different makers above No. 100 do you charge any more for the Merrick thread in numbers above 100 than you do for the corresponding numbers of the other makers?

A. I do not, as they cost me all the same.

86 X Q. Do you buy your Merrick thread any cheaper than you do Coats'?

A. Not specially so.

87 X Q. How much cheaper do you buy it than Coats'?

791 A. Two or three cents a dozen.

88 X Q. Do you get any cabinets or extras thrown in?

A. Not more so than from any other maker's thread I sell, except counter wrappers, which the others do not furnish at present.

89 X Q. What are "counter wrappers," and of what use are they?

A. They are manila paper printed by the Merrick Company with their name and recommendation to consumers to try their best six-cord thread, with my name and advertisement also printed on at the bottom. They are used by dealers to wrap any goods they may sell in they wish, and were at one time furnished by all thread companies—almost all.

90 X Q. Do you sell your Merrick thread to your customers any cheaper than you do the threads of any other makers?

A. I do not at retail, but at wholesale about two cents a dozen less.

91 X Q. Do you buy any other maker's thread as cheap as you do Merrick's?

A. Not quite. The difference I have stated in my previous answer.

92 X Q. Do you pay the same for the threads of all other makers except Merrick's?

A. All except Brooks'. The trade price of theirs is lower.

93 X Q. Lower than Merrick's?

A. Yes; somewhat.

94 X Q. Do you sell Brooks' at the same retail price as Merrick's and the others?

A. I do at retail, but not at wholesale, it being lower.

95 X Q. Are you aware of the fact that the thread of all numbers above 100 of all the makers other than Merrick is three-cord thread?

A. I am at present.

96 X Q. Do you regard it as any imposition upon your customers to sell them the high numbers of three-cord thread of other
792 makers than Merrick at the same price that you charge for the Merrick high numbers six-cord thread?

A. Not unless they buy the others, knowing it is three-cord and still want it.

97 X Q. In such case you would consider it an imposition to charge them the price of six-cord thread?

A. I think I should if they supposed they were getting six-cord when they were not.

98 X Q. How long have you known that the Merrick high numbers were six-cord and the high numbers of the other makers were only three-cord?

A. For a year or more.

99 X Q. Have you ever explained the difference to your customers or any of them?

A. I have to some somewhat.

100 X Q. To how many, and to what extent do you mean by somewhat?

A. As to how many I cannot say intelligently, and by "somewhat" I mean quite a number, considering how few there are that buy thread in finer numbers than 100.

101 X Q. Have you left any of you customers in ignorance on the point that the Merrick high numbers were six-cord and the high numbers of the other makers were three-cord?

A. I presume I have, some of them.

102 X Q. But you have continued to sell them the high numbers of three-cord at the same price as the six-cord, have you?

A. I certainly have, when they have asked for the make of thread they desired and the number, as all numbers of the other makes cost alike and are sold alike at wholesale and retail.

103 X Q. In one of your answers to-day you spoke of "Clark's thread on black spools." Do you regard the use of black spools as a distinguishing characteristic of any make of thread; and, if so whose?

A. I do. Clark's "Mile-end" is frequently distinguished from Clark's "O. N. T." by the black spool.

793 104 X Q. Do you regard the use of long-shaped spools as a distinguishing characteristic of any make of thread; and, if so, whose?

A. I do; in the case of Merrick's; especially so in all the numbers most used.

105 X Q. Do you regard the use of a star embossed on the wood on the head of the Merrick spools as a distinguishing characteristic of the Merrick spools and thread?

A. I do not, as it is not usually noticed, in my opinion.

And, being further examined by Mr. WITTER, he says:

106 R. D. Q. Why, if you know, or why do you suppose (if you do not personally know) does the Merrick Thread Company or any other comparatively new company sell its thread to wholesalers a trifle cheaper than the old-established, well-known, and popular thread-makers?

(Objected to as leading and incompetent.)

A. In order to introduce it to the jobbers and have them somewhat push it, believing that when once introduced it will demand the full price of the combination thread companies' price, I presume, as in the case not only with thread, but other goods of a like nature in the market.

EDWARD A. LE PARD.

Subscribed and sworn to this 31st May, 1887.

W. H. KENYON, *Notary.*

794 NEW YORK, *June* 1, 1887.

Met pursuant to adjournment.

Present: W. C. Witter, Esq., for defendants; Sam'l R. Betts, Esq., for complainant-.

AARON G. BALDWIN, a witness of lawful age produced on the part of the defendants, being by me first cautioned and sworn to speak the truth, the whole truth, and nothing but the truth in the matter in controversy herein, and being examined by W. C. WITTER, Esq., of counsel for defendants, deposes and says:

1 Q. What is your name, age, residence, and occupation?

A. Aaron G. Baldwin; age, 66 years; residence, 37 Myrtle avenue, Roseville, Newark, New Jersey, and by occupation a merchant. My store is at 633 Broad street and 1, 3, and 5 New street, Newark, N. J.

2 Q. What is the name of your firm?

A. George P. Baldwin & Co.

3 Q. And you are a member of it?

A. Yes, sir.

4 Q. Is the sale of spool thread a part of your business?

A. Yes, sir.

5 Q. About when did you begin to sell spool thread?

A. In 1842.

6 Q. And have you been engaged in selling spool thread, either at retail or wholesale or both, ever since?

A. With the exception of about 20 years, as near as I can remember without figuring up, but that was not all at one time. There have been three or four breaks in it.

7 Q. Mention the 200-yard six-cord threads that you have principally sold at retail and at wholesale during that period.

A. Clapperton's, Coats', John Clark's, Jr., and George A. Clark & Co., and Merrick's, and some Brooks', and I have sold some Willimantic.

795 8 Q. Which do you sell the most of?

A. George A. Clark & Co.'s.

9 Q. Which next are you selling most of?

A. John Clark Jr.'s, which is called the "Mile-end."

10 Q. Which next?

A. It is hard to tell, but I think most of Coats' next.

11 Q. What next?

A. Merrick's.

12 Q. Did you ever sell a thread known as Orrs & Macnaught?

A. Yes, sir; I have sold it.

13 Q. For about how many years, as near as you can judge?

A. Guessing at it, I should say three or four years; possibly longer.

14. About when?

A. I think from 1865 to 1869. I am not exactly certain as to time.

15 Q. State whether at that period you considered the Orrs & Macnaught spool thread a well-known or popular thread.

(Objected to as incompetent.)

A. I considered it so in the section where I was.

16 Q. Look at the Defendants' Exhibit No. 48, Chronological Exhibit, and state whether you recognize the George Clark, the John Clark, the Coats, the Merricks, the Willimantic, and the Orrs & Macnaught thread there contained as the threads which you have mentioned as having dealt in with their proper labels and marks.

A. Yes, sir; I do.

17 Q. What colored labels has it been the custom for the principal thread-makers to use on one end of their 200-yard six-cord thread as a general rule?

A. I think gold and black.

18 Q. What shape of label has it been their custom to use?

A. Round.

796 19 Q. What has it been their custom to print upon them?

A. The name of the cotton, the maker's name, and the number and the kind of thread—six-cord.

20 Q. Taking all the numbers of the various makers, what, in your opinion, appears most plainly on the label?

A. The name of the kind of thread.

21 Q. Such as what?

A. Such as J. & P. Coats, the George A. Clark & Co. thread, and the Merrick Co. or John Clark, Jr.

22 Q. What do you think appears next in prominence after the name?

A. Well, the number, I should say.

23 Q. How are these threads that you have mentioned distinguished from each other in the market by dealers and consumers?

A. By the name of the manufacturer of the thread on the spool and kind, as "Merrick Thread Company, six-cord thread;" best six-cord thread.

24 Q. Did you just say, "I don't know whether the word best is there or not"?

A. Yes, sir.

25 Q. How do consumers designate what thread they want—I mean those consumers who are particular what they want and don't merely ask for a spool of thread?

A. By the name of a thread they wish to buy, which is on the spool.

26 Q. Are there a good many customers who don't care what make of thread they have and who merely ask for the number?

A. There are some, but I think the proportion is not large.

27 Q. What trouble and cost do thread-makers take upon themselves to cause their thread to be known by their names?

A. Well, they label the spools, make boxes to put the spools in with labels on, send out circulars and cards and pictures and

797 wrappers to give away to customers. There may be more,

but I can't think of them now, and they advertise to a considerable extent.

28 Q. Do they also send cabinets in which to put their thread respectively?

A. Yes, sir.

29 Q. State whether upon all these articles the name appears, and whether prominently or not.

A. To the best of my knowledge they do; prominently.

30 Q. Has it been your practice to keep the different kinds of threads in your store in the same place or in different places, separate from each other?

A. Principally separate.

31 Q. Look at the exhibits which I now show you and say if they are examples of some of the articles sent out for the purpose you have mentioned.

(The following exhibits are shown the witness: Def'ts' Exhibit 35, Cabinet; 36, Show-Card No. 1; 37, Show-Card No. 2; 38, Advertising Card; 39, Show-Card No. 3; 40, Ten-Dozen Wrappers; 41, Counter Wrappers; 42, Color Card; 43, Box Containing One Spool and Advertisement; 44, One-Dozen Box.)

A. They are.

32 Q. Has it been the practice and is it the practice of the other principal makers of thread to take the same or similar means of making their thread known to the world?

A. Yes, sir.

33 Q. I see upon the wooden rim of the Merrick spools a number stamped on the wood. What does that number mean?

A. It means the size of the thread; the same as is on the label.

34 Q. What is the use of stamping it in the wood?

A. In case the number on the label became defaced or lost off it would still retain the size of the thread.

798 35 Q. Do you know of any other object or purpose in having the number indicating size upon the wood?

A. I can't think of any other.

36 Q. Why does it appear more than once on the wood? What utility is there in that?

A. Well, I don't know, unless they can see it quicker upon picking it up without turning it around.

37 Q. State whether or not labels do get defaced and lost off in handling and in use.

A. They do sometimes.

38 Q. What do the words "best six-cord" mean upon the labels of spool thread?

A. It means that the thread is twisted out of six threads laid together, and therefore stronger and better than three-cord.

39 Q. Did you ever observe that the Coats spools of 200 yards six-cord thread in numbers above 100 were labeled or marked any differently from the numbers below 100?

A. I have never seen any difference.

40 Q. Are you aware that those numbers of Coats' above 100 are three-cord thread?

A. Yes, sir.

41 Q. How did you find it out?

A. By untwisting the cord.

42 Q. Before you found it out did you suppose those numbers were six-cord?

A. I did.

43 Q. Which brings the highest price, six-cord or three-cord thread, and what is the difference, about?

A. The six-cord brings the highest price, and the difference is about 32 to 50 cents in the same quality of cotton.

44 Q. Which is the plainer way of printing the name of the thread on the label, in your opinion, black letters on a gilt ground or gilt letters on a black ground?

799 A. Well, in my opinion, black letters on a gilt ground. I suppose it is a matter of opinion

45 Q. What would you mention as the most important qualities of the best thread, in the order of their importance?

A. Do you mean white thread?

46 Q. Well, regardless of color.

A. Strength, smoothness, and bleaching if white thread, and color if colored thread.

47 Q. And is this true of all the numbers, whether high or low?

A. I think so.

48 Q. Which of the threads you have mentioned is, in your opinion, really the best thread?

A. I really don't think there is much difference at the present time.

49 Q. Why do you say at the present time?

A. Well, because a number of years ago the Merrick thread was made here and most of the other threads were made abroad, and I thought the American make—the Merrick Thread Company's make—had more careful hands and were more careful themselves, and therefore made better thread than those made abroad; but at the present time they are most of them made in this country and I think there is not much difference. I think the American or Merrick Thread Company's thread was the strongest in former time.

50 Q. Did you deal in the thread now known as the Merrick thread at the time when it had the American name on the black and gold label and was known as the American thread?

A. I did.

51 Q. About when first, as near as you can remember?

A. I think about 1868 or '9, as near as I can remember.

52 Q. Did you ever know of anybody's buying Merrick's thread by mistake, thinking it was Coats'?

A. No, sir.

800 53 Q. State whether, in your judgment, consumers with such attention as such people ordinarily give would be likely to take the Merrick thread for the Coats by mistake when the Coats was what they desired.

A. I don't think they would.

54 Q. Why not?

A. Because if they could read I should think they would know the difference.

55 Q. How much more of Clark's "O. N. T." thread do you sell than of any other make?

A. Do you mean one make?

56 Q. Yes.

A. As much or more than four times as much.

57 Q. How much more than all the others put together?

A. I have not made a nice calculation on that, but I should think as much or more at the present time where we are; perhaps nearly twice as much.

58 Q. Has it been your practice, when a particular kind of thread is asked for, to give the customer some other maker's thread?

A. Never, unless we were out of the kinds asked for and they were willing to take some other kind as a substitute.

59 Q. What should you say of a man who should intentionally sell Coats' thread for Merrick's without explaining what he was doing to the customer?

A. I should think that he could hardly be called honest—unless somewhat intoxicated.

60 Q. Would a person, taking reasonable care, be likely to do such a thing under a mistake or to sell Merrick's for Coats' or Clark's for Coats' under a mistake?

A. Not very likely.

61 Q. At what price do all these threads sell to the consumers—that is, the retail consumers?

A. I presume they principally sell at five cents a spool, but there may be some parties who break the rule, and in some cases they may be sold for less.

801 62 Q. The Merrick and Brooks are bought for something less by wholesalers than the thread of those makers forming what is known as the combination, are they not?

A. Well, if I understand what the combination means, they are.

63 Q. What makers, as you understand it, form the combination?

A. John Clark, Jr., "O. N. T." or George Clark's, J. & P. Coats' and Mr. Kerr's cotton. There may be more in it, for aught I know.

64 Q. The Willimantic is in it, isn't it?

A. I guess so. I have understood so. I don't deal in it now, nor in Kerr's.

65 Q. Were you ever candidate for sheriff of your county; and, if so, with what result?

A. I was, and was not elected.

66 Q. What office did you thereupon fill and for how long?

A. I filled the office of under sheriff for about six years and three months.

67 Q. You spoke of dealing in Orrs and Macnaught thread for a time. Can you recall the name of any firm whom you remember as having dealt largely in that thread? If so, please mention the name.

A. Calhoun & Robbins dealt in it, and I think quite largely. I might say Calhoun, Robbins & Co.

68 Q. Did you ever observe the star on the black and gold label on Merrick & Co.'s thread?

A. Yes, sir.

69 Q. When first did you observe the star?

A. Do you mean the American Thread Co. or Merrick & Co.?

70 Q. Both.

A. I have observed it from the time they commenced manufacturing, which was in 1868 or '9, somewhere about there.

802 71 Q. State whether, in your opinion, that star is a means of distinguishing the thread from the Coats thread, additional to the name.

(Objected to as leading.)

A. I think it is. I have frequently had it called for as the Star cotton.

And being cross-examined, he says:

72 X Q. You say in answer to question 6 that you have been engaged in selling spool thread since 1842, with the exception of about twenty years; give the dates of that 20 years' interval.

A. It is in several broken divisions; one would be dating back from 4 years and 3 months ago—take about 7 years; that's when I was in the sheriff's office; I was in the sheriff's office from 1876 to 1882; then I will have to go back about two years—from 1872 to 1874 I did not sell any; I was not very actively engaged in business then. I was running for sheriff. From 1865 to beginning of 1868 or from 1864 to 1868 I sold none except for Bird & Franches—they were agents for the Samoset spool cotton; that was three-cord—except a little six-cord which I sold in the last year of their employment. From 1855 to 1866 I was on a farm, the owner of a farm and managed it; that is to the best of my remembrance without being exact. About a year, from 1844 to 1845, there was another break; I wasn't doing much of anything that year.

73 X Q. Give me the name of all the members of your firm.

A. Myself and my son.

74 X Q. Give me his name.

A. George P. Baldwin.

75 X Q. Whose thread did you sell when you first began in 1842?

A. John Clark, Jr.'s, and pretty soon Chapperton's, and pretty soon again Coats'.

76 X Q. Did you sell any other than those up to 1855?

803 A. I don't recollect of any other.

77 X Q. When did you first sell the American Thread Co.'s thread?

A. About 1868 or '9.

78 X Q. Can you describe to me the label of that thread at that time?

A. It was a black and gold ground label, the words "American

Thread Co. six-cord machine thread," and a black star in the center, as near as I can remember.

79 X Q. How large a seller of thread have you been since you came back to business in 1882; I mean six-cord thread?

A. About from sixteen to eighteen thousand dozen a year.

80 X Q. Who were you in business with from 1874 to 1876, before you became under sheriff?

A. I was in partnership with a gentleman by the name of Sayre and part of the time alone. When I — alone it was A. G. Baldwin, and when I was with Mr. Sayre it was " Baldwin & Sayre."

81 X Q. With whom were you in partnership from 1866 to 1872, and where?

A. I don't think part of that time I was in partnership at all. From 1868 to 1874 is the time, I think. I was traveling for Bird & Francis and D. S. Hammond the most part of that time.

82 X Q. You say in answer 15, " I considered it so in the section where I was." Where was that?

A. Newark and New York and Orange.

83 X Q. You have had a long familiarity with the different labels of spool thread you have mentioned in answer to question 16, have you not?

A. I have had a pretty good familiarity. Some I have sold longer and some not so long. I have never been very critical in noticing the labels except the general appearance of them.

84 X Q. You have been in the habit of selling thread to customers over the counter, have you, during the period you speak of as being engaged in the thread-selling business?

804 A. Part of the time over the counter and part of the time as commercial traveler or drummer. I suppose you mean by " over the counter " in the store.

85 X Q. What would be, in your opinion, the distinguishing mark of Clark's Mile-end thread to an ordinary buyer in a retail store?

A. " John Clark, Jr., and Co." and " Mile-end " would be the most distinguishing mark.

86 X Q. What else would be a distinguishing mark, if anything?

A. " Best six-cord thread."

87 X Q. What else?

A. I don't think of anything else at this moment. Perhaps the particular label they have, with a little silver interspersed with the gold, might be.

88 X Q. To a customer who merely asks for a thread by its number, what thread do you sell?

A. If we don't know what the customer wants we would be apt to give the first one we come to: " O. N. T." or " Mile-end," if they don't express any choice. Sometimes we give them Merrick's because it is a little lower in price and believing it to be just as good.

89 X Q. By lower in price you mean that you yourself buy it for less than Coats' thread?

A. We not only buy it for less, but we sell it for less.

90 X Q. You never sell Merrick's thread for five cents a spool?

A. We don't sell it by the spool—any cotton; we sell it by the

dozen. It is very seldom indeed that we only sell one spool. I don't remember of any case happening where we sold as little as one spool of late years.

91 X Q. Well by the dozen, do you ever sell Merrick's thread for the same price as Coats' thread?

A. No, sir.

92 X Q. Always less?

A. Always less; about five cents or four and three-quarters, and make the same percentage on it.

805 93 X Q. Don't you ever sell different makes of thread out of the same cabinet or drawer?

A. Very little; none out of the same drawer, but we have one cabinet that part of the drawers are "O. N. T." and part "Mile-end" to our smallest customers that want different sizes to make up a dozen.

94 X Q. Do you know of any other spools except Coats' and Merrick's which have numbers denoting the size of the thread stamped on the wood like those?

A. I don't think of any now, excepting silk.

95 X Q. Taking into consideration the fact that both the Coats and Merrick six-cord cotton spools are white and have the number of the thread stamped upon the wood and the lettering in black upon a gilt ground, is not the Merrick spool head and label more like the Coats spool head and label than any other you are familiar with?

A. White is more like white than black is like white so far as color is concerned, but they are no more alike than John Clark's is like O. N. T. The lettering, I think, has very little or nothing to do with it except to find the number when the label is defaced or lost.

(Answer objected to as irresponsive.)

96 X Q. You say, in answer to question 61, that you presume that all these threads sell at five cents a spool, but there "may be some parties who break the rule." What do you mean by "the rule"?

A. I mean selling at five cents a spool. It is the combination's wish that they should not sell for less than five cents a spool, as four cents is less than it cost them; it costs 55 cents a dozen, 5 off 30 days, or 55 cents with 6 off 10 days or cash, and it is pretty generally understood that a spool of cotton is five cents.

97 X Q. Do you get any cabinets, wrappers, or similar things as inducement to sell Merrick's thread?

806 A. We have had all of those articles. I am not aware that we are receiving any now; the wrapper business is pretty much played out; we get cards and we get cabinets with 25 or 100 dozen in them, but it is no particular inducement on that account to sell their thread, as they all do it.

98 X Q. Do you pay the same for all other threads except Merrick's?

A. No, sir; we get Brooks' at the same price that we get Merrick's generally.

99 X Q. Do you charge any more for the Merrick thread in numbers above 100 than you do for the corresponding numbers of the other makers?

A. We sell the Brooks and the Merrick alike, but the Coats and Geo. A. Clark and John Clark, Jr., we sell alike—that is, 55 cents off 30 days and 50 cents, 5 off, for the other two; we sell all cotton on the same percentage.

100 X Q. Am I to understand that you sell the Merrick thread in numbers above 100 for a less price than you sell Coats' thread of the corresponding numbers?

A. If we have it we do; we sell all thread alike; we make no distinction as to numbers.

101 X Q. Are you aware that the thread of all numbers above 100, of all makers except the Merrick Co., is three-cord thread?

A. I haven't examined it lately, but it used to run below a hundred; so far as I have examined it it is.

102 X Q. How long have you known that the Merrick high numbers were six-cord and the high numbers of the other makers were only three-cord?

A. The very highest numbers are only three-cord of either of them. I don't recollect the length of time. Somewhere about 110, I think, the Merrick's run three-cord and the Coats at 100; the Merrick's may run from 120. I am not certain on that point. The point where the Coats left off six-cord in former times was about 60, and Orrs & Macnaught about 80.

807 103 X Q. Speaking of 200-yards spools, how many cord is the Merrick thread above the Nos. 110 or 120 you speak of?

A. Three-cord or four; three, I think; I am not now positive.

104 X Q. At whose request did you come here to testify to-day?

A. Mr. Nathan came over for me this morning—Jonathan Nathan.

(Defendants' counsel admits that Jonathan Nathan is one of defendants' clerks.)

105 X Q. You were not subpœnaed to testify?

A. No, sir.

And being further examined, he says:

106 R. D. Q. You say in your answer to 95 X Q., "The lettering, I think, has very little or nothing to do with it, except to find the number when the label is defaced or lost." By the word "lettering" you refer to the figures upon the wooden part of the spools, do you not?

A. I do; I meant to have said figures instead of lettering; I meant the figures.

107 R. D. Q. If I understand your cross-examination, you mean to say that you have not sold spool thread by the spool or less than

a dozen—that is, strictly at retail—during more recent years; is that true?

A. That is so; formerly I retailed.

108 R. D. Q. Have you any interest whatever in the issue of this controversy?

A. None at all, except that I hope you won't call me here any more, as it interferes with my business.

109 R. D. Q. Is there any reason why you should show or feel any bias in favor of either party to the suit?

A. I don't know of any.

110 R. D. Q. Has your testimony been any different from
808 what it would have been if you had been regularly subpœnaed instead of asked to come here by Mr. Nathan?

A. It has not; I should only tell the truth anyhow, so far as I know it.

111 R. D. Q. I do not think that the statement of complainants' counsel in 95 X Q. is correct in all respects, and will therefore ask you to look at the Coats spool and state whether the lettering in the words "best six-cord" is black upon a gold ground or gold upon a black ground.

A. Black upon a gold ground.

112 R. D. Q. Now answer the same question as to Merrick's.

A. There they are gold upon a black ground.

113 R. D. Q. Do those words "best six-cord" appear in the same place on the two spools?

(Objected to as not called out by the cross-examination and as the spools are the best evidence.)

A. No, sir.

114. R. D. Q. What occupies the center of the label in the Coats spools?

A. 200 yards and the figure 36.

115 R. D. Q. And the figure varies with the size of the thread, does it not?

(Same objection.)

A. Yes, sir.

116 R. D. Q. What occupies the center of the label on the Merrick spools?

(Same objection.)

A. A star.

117 R. D. Q. And where is the number indicating the size placed?

(Same objection.)

A. Immediately under the star and outside of the center rim.

809 118 R. D. Q. Is there any lettering on the outer circle of the Merrick label except the words "Merrick Thread Co."?

(Same objection.)

A. There is lettering in the center circle—there are three circles—which is "best six-cord."

119 R. D. Q. Is there any lettering on the outer circle of the Merrick label except the words "Merrick Thread Co."?

(Same objection.)

A. None.

120 R. D. Q. In the Merrick label the name of the thread and the size of it takes up the whole outer circle, does it not?

(Same objection and as leading.)

A. Yes, sir.

121 R. D. Q. And of that circle the name occupies about five-sixths or seven-eighths, don't it?

(Same objection and as leading.)

A. I should say about three-quarters, measuring from my eye and looking at No. 36.

122 R. D. Q. In the case of Coats the name of the thread occupies less than half of the outer circle, does it not?

(Same objection and as leading.)

A. About one-third, I should think, in No. 36.

123 R. D. Q. In the case of the Merrick the number indicating size is shown upon a shield-shaped device in the space of the outer circle unoccupied by the name, very much as it appears in the Orrs & Macnaught, George Clark, Willimantic, Kerr's, J. Clark & Co., and others shown in Defendants' Exhibit No. 48, instead of in the center of the label, as shown in Coats' and John Clark Jr.'s. That is true, is it not?

(Same objection and as leading.)

810 A. It is.

124 R. D. Q. You have said that the Merrick thread was in early years known by the name "American." Does that name still appear upon the thread? Look and see.

(Complainants' counsel states that the witness has already said, after the above question was propounded, except the last three words, "I don't know as it does," when defendants' counsel hastily took up a Merrick spool and turned the bottom of it towards the witness so that he could see the same.)

A. Not on the front label. I see it is on the back.

125 R. D. Q. When you used the words "I don't know as it does" you had reference to the black and gold label end of the spool, had you not?

(Objected to as leading.)

A. Yes, sir; I was certain there was none on the front, but I wasn't certain and didn't know positively whether it was on the back or not.

And, being further cross-examined, he says:

126 R. X Q. In answering redirect questions 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, and 123 you had the two spools, No. 36 of J. & P. Coats and No. 36 of the Merrick Thread Co., taken from Defendants' Exhibit No. 48, Chronological Exhibit of Thread Manufacturers, holding them in your hand close, side by side, did you not?

A. Yes, sir.

127 R. X Q. And you made a close examination and comparison of them before answering each of those questions, did you not?

A. Yes, sir.

128 R. X Q. In answering R. D. Q. 123 you got up and walked over to the case, Defendants' Exhibit No. 48, and compared
811 closely the Merrick spool No. 36 with the various spools referred to in that question, did you not?

A. I went over and compared them.

AARON G. BALDWIN.

Subscribed and sworn to before me this 1st June, 1887.

W. H. KENYON, *Notary.*

Adjourned to June 2, 1887, at 11 a. m.

Examination adjourned to Wednesday, June 8, 1887, at 11 a. m.

NEW YORK, *June* 8, 1887.

Met pursuant to adjournment.

Present: Counsel as before.

JAMES H. BARTLEY, a witness of lawful age, produced on behalf of defendants, being by me first duly cautioned and sworn to speak the truth, the whole truth, and nothing but the truth in the matter in controversy herein, and being examined by W. C. WITTER, Esq., counsel for defendants, deposes and says:

1 Q. What is your name, age, residence, and occupation?

A. James H. Bartley; I will be 50 in October; residence, 495 Van Buren street, Brooklyn, Kings Co., N. Y., and by occupation a salesman in fancy goods department of the firm of Tefft, Weller & Co., 326 and 328 Broadway, New York.

2 Q. What is the business and standing of that house?

A. Dry-goods jobbing business. I can only say as to their standing by hearsay that they are the second house of their business in the city.

812 3 Q. Do you at present have to do, and, if yea, for how many years have you had to do, with the buying and selling of spool cottons?

A. I am engaged to-day in that business and have been since 1855.

4 Q. Continuously?

A. Continuously.

5 Q. And in what different capacities and in what different places?

A. Buying and selling spool thread and other Yankee notions; with Arbuckle & Co., New York city; Terbeil, Jennings & Co., N. Y. C.; F. Griswold & Kellogg, N. Y.; Tefft, Griswold & Co., N. Y., and Tefft, Weller & Co., New York.

6 Q. Have you sold spool cottons both at wholesale and retail?

A. Mostly wholesale; very little retail.

7 Q. What is the character of your business now at Tefft, Weller & Co.'s?

A. Buying and selling fancy goods and goods known in the trade as Yankee notions.

8 Q. What different makes of spool cotton do you buy and sell now?

A. Coats' thread, Clark's "O. N. T.," Clark's "Mile-end," Willimantic, Brooks', Holyoke, Alexander King's. That's all we keep in stock.

9 Q. What makes do you sell most of?

A. Coats' cotton.

10 Q. To what extent are your sales of Coats' cotton greater than of any other make of spool cotton?

A. Three dozen to one of any other.

11 Q. And are your sales of your Coats' cotton large or small—say in a year?

A. Very large.

12 Q. And to what parts of the country do your goods go? I refer to this Coats spool cotton.

A. Almost every State and Territory in the United States.

13 Q. What is your position in this house?

A. Salesman and assistant buyer in the Yankee notion department?

813 14 Q. That includes spool cotton, does it?

A. Yes, sir.

15 Q. What kind or grade of spool cotton is this Coats cotton that you sell so much of, and how is it put up?

A. It is known as six-cord cotton; it is put up on spools, and most of the spools placed in boxes.

16 Q. And how are the boxes put up?

A. With a cover on, labeled six-cord cotton, J. & P. Coats.

17 Q. That is the only line or grade of thread of Coats' make that you deal in, is it?

A. It is.

18 Q. What is the length of thread on these Coats spools?

A. To the best of my knowledge and belief it is 200 yards, I not having measured it since about 20 years ago, and at that time I measured 3 spools and they measured from 199 to 205 yards; this measurement was done by a machine made for that purpose.

19 Q. Then it is what is known as six-cord 200-yard spool cotton, is it?

A. It is.

20 Q. Is this grade and length the standard spool cotton for family use to-day? I do not limit the question to cotton of Coats' make, but refer generally to six-cord 200-yard spool cotton of any make.

A. It is.

21 Q. Are there other distinct lines or grades of spool cotton made and sold in the market?

A. There are.

22 Q. What are they?

A. Three-cord spool cotton.

23 Q. How does that compare in quality with six-cord spool cotton?

A. It is not as good.

24 Q. Is that fact a fact well known to makers and dealers and consumers of cotton thread?

A. It is known to dealers.

25 Q. Those are the people with whom you came mostly in contact in your selling spool cotton?

814 A. Yes, sir.

26 Q. How is the size of thread indicated in this line of Coats' cotton that you deal in?

A. By numbers on labels, said labels being placed on the end of each box, also on end of spool, and by numbers made in the wood on the spool of said Coats' cotton up to and including size 100 as far as the said cotton has come to my sight while selling the same.

27 Q. What is the object and advantage of placing numbers in these various places?

A. So that consumers and sellers may easily distinguish the sizes.

28 Q. What is the series of numbers used by Coats?

A. 8 to 200.

29 Q. And any one of these numbers placed in any one of the three positions you have named means to the dealer and consumer that the thread on the spool is of a certain definite size, which everybody has come to connect with that number; does it?

(Objected to as leading and incompetent.)

A. Yes.

30 Q. Do all makers of corresponding grades of spool cotton—that is, six-cord 200-yard spool cotton—use the same number for the same size of thread—that is to say, does No. 50, for instance, mean about the same thing, whatever the make of cotton? I refer to size, of course.

A. It is so known in the trade.

31 Q. How many numbers above 100 are there in the line of Coats' cotton sold by you?

A. Six.

32 Q. And about what proportions of your sales of Coats' spool cotton is of these six numbers—that is, the six numbers above 100?

A. About an eighth of one per cent. of total sales of Coats'.

815 33 Q. Do these six numbers form part of the line of Coats' thread that you deal in and have dealt in for years?

A. They do.

34 Q. Do they continue the regular sequence of sizes that began with the coarsest No. 8—that is to say, are they all finer than No.

100 and form a sequence after No. 100 finer and finer as the numbers are higher, just as the numbers below 100 are all coarser than No. 100 and form a sequence coarser and coarser as the number is lower? I want to know whether all the numbers from 8 to 200 form one regular and complete sequence of sizes.

A. From No. 8 to 200 they form a regular sequence of numbers in white; in black I am not so sure of; the other colors do not run up so fine.

35 Q. A regular sequence of numbers corresponding with a regular sequence of sizes of thread?

A. I would like you to explain that a little.

36 Q. You stated that Nos. 8 to 200 formed a regular sequence of numbers. I want to know whether that regular sequence of numbers when applied to spool cotton means a regular sequence of sizes of thread from the coarsest to the finest, each different number meaning a different size.

A. It does.

37 Q. What did you mean in your answer to 342 by your reference to "black" cotton?

A. There being a very small quantity of numbers above 100 sold in black, I am not positive how fine it runs.

38 Q. Do you ever buy or sell this Coats spool cotton in assorted cases; I mean cases assorted as to number?

A. We do.

39 Q. Do such cases sometimes contain the entire line of sizes?

A. No, sir.

40 Q. What numbers do you put up in such cases?

816 A. Numbers 8 to 60 and about 8 to 100; nothing above 100.

41 Q. How do the finer numbers of Coats' cotton, say above 110, come to you?

A. In paper boxes, 1 dozen spools in a box.

42 Q. Do you always buy it separately from the lower numbers?

A. No, sir; we buy such numbers as we want from time to time as our necessities demand.

43 Q. That is, you buy such numbers from 8 to 200 as you want?

A. Yes, sir.

44 Q. And the goods are all packed together and billed and shipped to you together, whatever the numbers from 8 to 200 that you ordered?

(Objected to as leading.)

A. They are.

45 Q. Are these numbers finer than 110, say, sold to you at a different price from the other numbers; and, if so, what is the difference?

A. They are all bought at the same price.

46 Q. And what is that price for Coats' spool cotton, if you feel at liberty to state it?

A. They have a fixed price with every person buying a certain quantity of spool cotton and I do not feel at liberty to state that price.

47 Q. How does that price which you have to pay for all of these numbers of Coats' spool cotton from 8 to 200 compare in a general way with the price which you would have to pay for that grade of spool cotton which you have termed three-cord cotton?

A. About one-half; three-cord is about half the other.

48 Q. By my reference to three-cord cotton in the last question I meant that grade of cotton thread which is bought and sold in the market as three-cord thread and is so marked and so known; did you so understand the reference?

A. I did so understand it.

817 49 Q. And in your shipping and billing of Coats' spool cotton what is your practice as to making or not making a distinction between the numbers, say, above 110 and the numbers below 110?

A. There is no distinction at all; they are all charged at one price and are so bought.

50 Q. What has your experience of 30 years been in that regard; what has been the general practice?

A. In all standard six-cord cotton all numbers and colors are bought and sold at one price.

51 Q. And this has been true of Coats' standard six-cord 200-yard spool cotton from Nos. 8 to 200 or to whatever degree of fineness the thread ran, throughout your experience, has it?

A. It has.

52 Q. And what has been your experience as to whether or not in other respects than price all of the numbers of Coats' cotton of all degrees of fineness from 8 to 200 have been dealt with and treated generally as of equal and the same quality throughout all the numbers?

A. My experience is that all Coats' cotton that I have ever sold has been one price in every number and color.

53 Q. And has it been considered and dealt with as one quality throughout all the numbers, so far as your experience goes?

(Complainants' counsel asks defendants' counsel to state more specifically what he means by the word "quality." Defendants' counsel explains to complainants' counsel and to witness that by "quality" in the question he has reference generally to anything that would affect the serviceable character of the thread as thread, including quality of cotton, material used, character of spinning and bleaching and winding, and the fact of the thread having three strands or six, etc.)

A. It has.

818 54 Q. Do you know whether or not the numbers of this thread of Coats' above 100 are six-cord?

A. I always thought they were till a year or so ago, when my attention was called to the fact that they were not. I then took a few spools of 150 and on examination I could not find they were six-cord, but they were less—either three or four—which I am not positive. The box which I took the spools from was labeled at that time "six-cord," but on a box of the same number opened by me

this morning the words "six-cord" were omitted on the box. The self-same goods—that is, the No. 130—opened this morning still comes under the same category of all standard six-cords that we deal in and will be charged as six-cord, I ruling in my business that six-cord is more of a trade-mark as far as high numbers of cotton are concerned.

55 Q. Could you sell these high numbers of Coats' thread that it seems are not in fact six-cord at the price of what you have termed three-cord thread; I mean could you do so with reasonable profit; and, if not, why not?

A. I could not—for one reason, they cost more money than what the thread known in the market as three-cord thread is sold for; secondly, buyers are under a contract to sell all numbers and colors at the present price of fifty-five cents less 5 per cent. 30 days or 6 off 10.

56 Q. Who is it that obliges you to sell these high numbers which are in fact not six-cord at six-cord prices?

(Objected to, as the term "six-cord prices" is indefinite.)

A. The agents of the Coats', Clark's O. N. T., Clark's Mile-end make the prices and terms for jobbers to sell all their cottons, they being all known as six-cord in the trade.

57 Q. What would be the penalty, if any, if your house
819 should sell these finer numbers of Coats' thread which are not six-cord at the price of what is known in the market as three-cord thread?

(Objected to as immaterial and a matter of business arrangement which has nothing to do with this case.)

A. I object to that question as a private business arrangement unless I am forced to do so, but I will say that the penalty would be the same for any number of thread made, from 8 to 200.

58 Q. That is, for underselling on any number?

(Same objection.)

A. Yes, sir.

59 Q. I do not ask you to disclose any private business matter, but merely wish the court should know whether or not it would be at all a serious matter for your house if you should sell the fine numbers of Coats' above 100 at the lowest price.

(Same objection and as misleading, the witness having already stated that the same rule applied to all numbers.)

A. It would be a serious matter to sell any number at a lower price.

60 Q. Who are the parties to this contract under which, as I understand you, you buy this Coats thread?

(Objected to as immaterial and because the testimony of this witness is not the best evidence.)

A. The agents of J. & P. Coats, who are selling in New York; Auchincloss Bros., and the firm of Tefft, Weller & Co.

61 Q. Can your firm buy from the agents of J. & P. Coats except under the contract you have referred to?

(Objected to as immaterial.)

A. No, sir.

820 62 Q. How many years had you dealt in these fine numbers of Coats' thread which are not six-cord before you knew that they were not six-cord?

(Same objection.)

A. I commenced the business in 1855 and have sold Coats' thread in all numbers they have made up to date, and only discovered the high numbers not to be six-cord a year or so ago.

63 Q. Prior to a year or so ago what did you suppose those high numbers were?

A. Six-cord.

64 Q. Why?

(Same objection.)

A. From the mark on the packages.

65 Q. State all the reasons you can think of that led you to any extent to think those high numbers were six-cord.

(Same objection and as the witness has already answered it.)

A. The brands and labels on the boxes, advertisements, and being taught in my business that it was six-cord.

66 Q. What, so far as your experience goes through these 30 years, is the general understanding of the trade and of consumers as to whether or not these fine numbers of Coats' thread are six-cord?

(Objected to as immaterial.)

A. I will answer only as far as the notion trade is concerned that we buy and sell them for six-cord cotton, not coming in contact to any extent myself with consumers of the cotton.

Adjourned till Tuesday, June 14th, at 11 a. m.

821 NEW YORK, *June* 14, 1887.

Met pursuant to adjournment.

Present: Counsel as before.

And being further examined, the witness, BARTLEY, says:

67 Q. Did you ever notice any difference between the black and gold labels upon Coats' 200-yards spool thread of numbers 8 to 100, inclusive, and those upon 110 to 200, inclusive?

A. I have, within a short time.

68 Q. State how your attention was called to that difference.

A. By one of the employés of the American Thread Company saying that the word six-cord was dropped from the label on box and spool.

(Answer objected to as incompetent, inasmuch as it contains the statement of a third party.)

69 Q. About when was this?

A. From a year to a year and a half ago. I cannot state exactly.

70 Q. And previous to that time had you noticed any difference?

A. I had not.

71 Q. State whether, in your opinion, purchasers of that cotton would be likely to notice the words "best spool cotton" on those high numbers as being different from the words "best six-cord" on the lower numbers.

(Objected to as incompetent.)

A. I only speak for myself; I would not.

72 Q. Have you yourself bought it for your family use, both high and low numbers?

A. I have; yes, sir.

73 Q. And did not notice the difference?

A. No, sir.

822 74 Q. During the time you have been buying and selling spool thread what colored labels have been used by the various makers for their best quality?

A. A round label, combination of black and gilt, some with a little silver in the black.

75 Q. Do you know of any with silver combination with the black and gilt except John Clark's?

A. I can't bring to mind now.

76 Q. Won't you name some of the threads of best quality that have borne labels upon one end of the spool colored black and gilt and circular in shape?

A. George A. Clark's O. N. T., Clark's, Orrs & Macnaught's, The American Thread, Kerr's, and Willimantic.

77 Q. Would you also include the Hadley Company's thread and the Merrick Company's thread?

A. Yes, sir.

78 Q. Have you personally dealt in all these threads that you have mentioned?

A. I have sold all of them except Kerr's.

79 Q. How have these various threads been known and asked for by the purchasers?

A. Coats' by asking for Coats' cotton, Clark's O. N. T., Clark's Mile-end, Orrs & Macnaught, and Hadley's, Willimantic, Merrick's.

80 Q. If I understand you, then, you mean to be understood that these threads are known and asked for by the name of the maker; is that so?

A. Almost invariably; sometimes six-cord cotton is asked for, and it is my practice when six-cord is asked for to give Coats' cotton, there being generally no objection to that.

81 Q. What of the threads you have enumerated is the best?

A. My own judgment, and I do not think there is much difference in the quality or length.

82 Q. Which is the best spool cotton, six-cord or three-cord?

A. In my judgment, for general use six-cord is the best.

823 83 Q. Does your concern keep the Merrick thread in stock?

A. They do not, but if called for we buy it and sell it to our customers.

84 Q. That sometimes happens, does it?

A. It does.

85 Q. Compared with Coats', to what extent do you sell Merrick's? Give your judgment approximately.

A. This is an odd question to answer; we sell many thousand dozen of Coats' to one of Merrick's.

86 Q. What is the use of having the size of the thread stamped upon the wooden spool in addition to having it on the paper label?

A. So that should the paper label come off the consumer can tell the number at sight.

87 Q. What use is there in having the wooden number appear several times on the spool?

A. The spool in any position that you place it will distinguish the number very readily.

88 Q. State whether the number on the label becomes defaced, and mention some of the means by which it becomes defaced.

A. Well, sometimes the label slips off and sometimes I have seen it in my family get pushed out by the sewing machine and the children poking sticks through it.

89 Q. Does the number get rubbed off or obscured by revolving on the sewing-machine spindle sometimes?

A. I should say that it did, so far as I know anything about sewing machines; an iron rod which they put the spool on is what defaces it.

90 Q. Do you remember yourself adopting any means to preserve the number on the spool after the number was obscured on the label or the label lost off?

A. Yes.

91 Q. State what.

A. In my boyhood days I used to number the spools for
824 my grandmother and my mother with a lead pencil on account of the children defacing the labels with scissors and sticks.

92 Q. You mentioned a thread, Orrs & Macnaught's, awhile ago; during what period did you deal in that thread?

A. In the neighborhood of 1865 and 1870 or thereabouts; at least until it was drawn out of the market by Mr. Knox.

93 Q. What did Mr. Knox have to do with it? And give his full name.

A. He was the agent in this city; his name was Alexander Knox.

94 Q. State whether it was a well-known, popular thread.

A. It was.

95 Q. State whether you recognize the Orrs & Macnaught spools

of thread in Defendants' Exhibit No. 48 as examples of the Orrs & Macnaught thread you refer to and the way in which it was marked and labeled while you dealt in it.

A. Yes, sir.

96 Q. During the period you refer to what percentage of the thread you sold was Orrs & Macnaught, as near as you can estimate?

A. I can hardly estimate the percentage, but should say that three-fourths of our sales about that period was Coats' cotton and Clark's O. N. T., and the balance was made up of John Clark's and Orrs & Macnaught's.

97 Q. Which, in your opinion, is the plainer way of designating the name of the thread upon the label, black letters on a gilt ground or gilt letters on a black ground?

A. Gilt letters on a black ground.

98 Q. Will you look at the spools with their labels in Defendants' Exhibit No. 48, where both kinds are shown, and state whether you did not mean the contrary of what you have said?

(Objected to as leading and as the witness has fully stated his opinion.)

825 A. I think gilt on black would be the best, as my answer was before.

99 Q. As shown upon what spools?

A. A sample of the Willimantic.

100 Q. State what is furnished by the Coats people with their thread?

A. I do not exactly understand the question, except they furnish cabinets to customers filled with cotton and don't charge for the cabinets and advervising cards with the name "Coats' cotton;" so does George A. Clark O. N. T. cotton. Clark's Mile-end furnishes cabinets; so does Willimantic; also most of them furnish small cards to hang up in the store with the name of the thread on them.

101 Q. Which companies form what is known as the combination?

A. I throw out the word combination, and would say that George A. Clark O. N. T. thread, Clark's Mile-end, and Coats' make a price for us jobbers to sell by. Of the other thread companies I am not positive, I not knowing whether there is any combination between them.

102 Q. Do you understand that Willimantic is in alliance with the companies you have mentioned for the same purpose?

A. I do not know.

Being cross-examined, the witness further says:

103 X Q. You say you have sold spool cottons mostly at wholesale. Please state the manner of selling spool cotton at wholesale; how the sale is made, how the cotton is billed, and shipped, etc.

A. I have. Customers say they want spool cotton. I ask them what kind they want. They say they want either of the kind they

generally keep at their place of business. For instance, some want Clark's O. N. T., some Coats', some Clark's Mile-end, or sometimes that same brand is called for by stating that they want Clark's cotton, white on a black spool, or any other brand which they may wish. When that is done they read off sizes and colors
826 which they want. We afterwards pick them out, and at the present day charge them on a thirty-day bill under the name of six-cord cotton, five off thirty days, except in cases of cabinets, which come already put up for shipment, for which we charge on the same bill the same price and time.

104 X Q. Your customers, when you have been selling the spool thread of the different firms you have mentioned, have been doing what style of business?

A. Selling generally to consumers. To a great extent they keep what is denominated in the dry-goods trade as retailers and general country store keepers.

105 X Q. And as a buyer for those firms you have bought in large quantities, have you not, and with an expert knowledge of the different makers, labels, qualities, etc.?

A. Yes, sir; as far as quality and brands are concerned.

106 X Q. You speak of selling three dozen of Coats' cotton to one of any other. Is not the price fixed for Coats' the same as that for the cotton of the other companies you have mentioned as fixing the price of cotton for jobbers?

A. Of all those that we keep in stock which I have named it is the same price—Coats', Clark's O. N. T., Clark's Mile-end. Those are all we keep in stock.

107 X Q. To what do you attribute the so much larger sale of Coats' cotton by you as compared with the others?

A. I attribute it to the well-known character of the cotton itself; also the same character to the makers and their agents that they have had, and it being well established in the Southern trade before the war, and it having steadily increased in sales in the East, West, and North since that time by reason of their paying great attention to quality and colors every season for many years.

827 108 X Q. As an established brand of spool cotton does not the Coats spool cotton stand far superior in the estimation of the trade to the spool cotton made and sold by the Merrick Thread Company?

A. Not having sold much of Merrick's spool cotton, I cannot say much about its intrinsic worth, but in our own business Coats' does stand ahead of the others—of the Merrick—the Merrick cotton being a much younger brand in the market.

109 X Q. What is three-cord spool cotton used for principally?

A. I am told by my customers that they sell it generally for basting purposes and light manufacturing.

110 X Q. Does any other company to your knowledge besides Coats and the Merrick Thread Co. put numbers indicating the size of the thread embossed upon the wood of the spool?

A. No others to my knowledge.

111 X Q. Look at the Merrick spools in Defendants' Exhibit No.

48 and state whether the numbers indicating the size of thread upon the paper labels would be destroyed by putting those Merrick spools upon the spindle of the sewing machine.

A. This is a question. I could not say, as I have never tried it on a spindle.

112 X Q. What is your opinion from observing the spools?

A. I have no opinion in particular on that.

113 X Q. How would it be with the Coats spool?

A. That would disfigure the number.

114 X Q. Can you tell me how the numbers, which you say indicate the different sizes of thread on the Coats and other spools, first came to be adopted?

A. I cannot.

115 X Q. Did not the Coats use this series of numbers, as at present, long before the Merrick thread was put upon the market?

A. Yes, sir.

116 X Q. Do you know of your own knowledge that the Coats No. 20 and the Merrick's No. 20 are in fact exactly the same size of thread?

828 A. No, sir; I do not.

117 X Q. And that same answer would hold true as to all the corresponding numbers of Coats and Merrick, would it not?

A. It would.

118 X Q. Do jobbers and retailers, in your experience, take any measures to test the actual sizes of the thread they deal in?

A. I have done the same myself some years ago.

119 X Q. It is very unusual to do so, in your experience, is it not?

A. It is.

120 X Q. What proportion of your total sales of spool cotton on the average is of numbers above 100?

A. About an eighth of one per cent.

121 X Q. Are Clark's O. N. T. and Clark's Mile-end spool cotton in the numbers above 100 six-cord or three-cord?

A. When I last examined them, which was a year and half ago, about that time, I could not but make them three or four thread.

122 Y Q. How about Willimantic in that respect?

A. I never examined that.

123 X Q. Can you state whether Willimantic in numbers above 100 is considered in the trade to be three-cord or six-cord?

A. It is called in the trade six-cord.

124 X Q. And Clark's O. N. T. and Mile-end in numbers above 100, which you have stated were less than six-cord in fact, are also called in the trade six-cord, are they not?

A. They are.

125 X Q. Then on these higher numbers is not the term "six-cord" a kind of trade-mark, indicating 200-yard spools of these higher numbers?

(Objected to as leading and as involving a question of law.)

A. It is in the standard spool cotton which I have mentioned.

829 126 X Q. Do you mean Coats', Clark's O. N. T., and Clark's Mile-end?

A. Yes, sir.

127 X Q. What is the length of thread on the spools sold as three-cord cotton?

(Objected to as immaterial.)

A. I think the spools of thread known in the trade as three-cord cotton—I think I have seen it vary from 18 yards to 200; some first-class three-cord cotton the makers thereof claim it to be 200 yards, but I have not measured any in a great many years and then only two which were then in the market, one of which was known under the name of George A. Clark's enamel cotton, and Green & Danielson, and they did not vary more than a yard or so, more or less, than 200.

128 X Q. Have you not a contract with the makers or sellers of Clark's O. N. T. and Clark's Mile-end cotton the same as you speak of having with the agents of Coats'?

A. We have.

129 X Q. And the penalties for underselling on the Clark's threads would be substantially the same as for underselling on the Coats' thread?

A. Yes, sir.

130 X Q. Are not those contracts entered into by the manufacturers you have mentioned on one hand and the jobbers on the other for the purpose of maintaining a uniform standard buying and selling price?

(Objected to as leading.)

A. They are.

131 X Q. Can you buy spool cotton made by the Merrick Thread Co. cheaper than you can buy the Coats' cotton?

A. I would state, having bought so little of it, I could hardly say that we have had it but a trifle lower than the other standard cotton. I mean by that at a trifle lower price.

830 132 X Q. You never kept a country store, did you?

A. No, sir.

133 X Q. Or came in contact with the small purchasers who buy spool cotton at such a store in your sales of spool cotton, did you?

A. I did in this way: Where I spent my vacation for about two weeks in the summer the proprietor of the house keeps a country store, and sometimes in the rush of trade I have sold some spool cotton to retail customers, although not very much; say three or four dozen in my life.

134 X Q. But you don't sell that way in your regular business, which you have testified about, do you?

A. No, sir.

135 X Q. You state that, in your opinion, purchasers would not

notice the words "best spool cotton" on the numbers above 100 of Coats' cotton as being different from the words "best six-cord" on the lower numbers. If they read those words they would notice that they were different, would they not?

A. I would know myself by reading it, but I could not tell what others would say. I think not, though.

136 X Q. Then it is because you did not read the words, but only looked at their general effect on the spool, that you did not notice the difference?

A. It was because of advertisement and the labels on papers and boxes for many years I considered it six-cord, and it was through my oversight that I did not discover it myself till my attention was drawn to the same.

137 X Q. Though you are an expert in this business and buy and sell very large quantities of Coats' cotton you did not discover that the wording on the labels of numbers above 100 is different from the lower numbers until you were told?

A. I only claim to be an expert in buying and selling and not in the manufacture, and only discovered the change in the label on its being brought to my notice.

831 138 X Q. Then, when two labels are substantially similar in appearance, does not your experience aid you to believe that a variation in the lettering may readily pass unnoticed?

A. No, sir; the name is the most prominent thing on the spool of cotton.

139 X Q. But you did not, as you have said, notice the difference between the labels of Coats' high and low numbers. Was not this due to the fact that the labels being substantially similar in their general appearance you believed they were all Coats' thread and did not read the letters?

A. They being labeled Coats' thread, knowing it was genuine as far as I could tell, I did not notice the alteration until the time mentioned above. Coats' spool cotton I have been identified with since my childhood, which is more than I can say of other spool cotton.

140 X Q. Is not three-cord cotton demanded for some special purposes in preference to six-cord? I refer to the actual number of strands in the thread.

A. It is if it can be bought at a low price so that it can be sold cheap to be used as basting cotton; the kind I refer to is the three-cord that is known as the trade-mark in our business.

141 X Q. You have said that you can buy Merrick's thread somewhat cheaper than Coats'. How does your selling price of Merrick's compare with Coats'?

A. It is lower. The reason why, Merrick's people have had lately some men on the road selling their cotton, and in one instance which I recollect of the customer quoted the price to us in a letter, and I sent and bought of Merrick's agent and just glanced at the bill and found I could sell it less than any of the above six-cord. I charged the goods at the price named for the customer and let it go

at that. I can only say that it was a trifle lower than Coats' and Clark's, but don't know the exact price.

142 X Q. Do you know that generally in the trade it sells lower than Coats' and Clark's?

A. I do; but supposed the reason of that was, being the
832 younger thread in the market, they had imitated some of the older manufacturers, which did the same when they started against Coats', and what is now known as Clark's Mile-end—that is, in giving a little better discount than Coats' and Clark's O. N. T. and Clark's Mile-end, whereby having a better opportunity in bringing it before the public.

(All after the words "I do" objected to as irresponsive.)

143 X Q. There is none of Orrs & Macnaught thread sold now in this country, is there?

A. Not that I know of.

144 X Q. About when did the sale of it stop?

A. I think about 1872.

145 X Q. Have you any specific recollection of what was the lettering on the labels of the Orrs & Macnaught spools at the time you say you sold it, without looking at the spools in Def'ts' Exhibit No. 48?

A. The spools were embossed on the edges in gilt and black label, the words six-cord 200 yards and the words "Orrs & Macnaught, number." This was on one end of the spool and on the other end was a white label, as near as I can recollect, with the words "Alexander Knox, agent."

146 X Q. Were you subpœnaed to come here?

A. No, sir.

147 X Q. At whose request did you come?

A. Mr. Palmer, agent of the Merrick Thread Company in New York city. He came and asked me to come about six months ago. I told him I would go for either party or both if they wanted me, provided my employers were willing. I asked my employers if I could go; they said yes, knowing all parties.

And in answer to redirect examination the witness says:

833 148 R. D. Q. Has your testimony been any different in this matter from what it would have been if you had been regularly subpœnaed?

A. No, sir.

149 R. D. Q. With whom have you had the longest acquaintance and the largest dealings, with the Coats and their agents, the Auchincloss family, or the Merrick Thread Co.?

A. With the Auchincloss Brothers and their immediate predecessors.

150 R. D. Q. To about what extent annually do you now buy and sell Coats' spool thread?

A. I could not state positively without referring to the ledgers of our house, but I was told by one of Auchincloss' agents about the

first of last January that our house, Tefft, Weller & Co., had bought more of their spool cotton than any house in this city.

(Answer objected to as incompetent.)

151 R. D. Q. You do know that your house buys and sells it very largely, do you not?

A. I do.

JAS. H. BARTLEY.

Subscribed and sworn to before me this 14th June, 1887.

W. H. KENYON, *Notary.*

Adjourned to Wednesday, June 15, 1887, at half past one p. m.

NEW YORK, *June* 15, 1887.

Present: Counsel as before.

PHILIP M. DEVIN, a witness of lawful age produced on the part of the defendants, being by me first cautioned and sworn to speak the truth, the whole truth, and nothing but the truth in the mat-
834 ter in controversy herein and being examined by W. C. WITTER, Esq., of counsel for defendants, deposes and says:

1 Q. What is your name, age, residence, and occupation?

A. Philip M. Devin; age, about 54; residence, No. 76 Third avenue, New York; occupation, I am a ladies' and gents' furnishing fancy goods dealer.

2 Q. Is your business a wholesale or a retail business?

A. A retail business exclusively.

3 Q. Has it been your business to sell thus at retail spool cotton among other things?

A. Yes, sir.

4 Q. For how long?

A. About fifteen years. It might be more.

5 Q. About when did you begin to sell spool cotton at retail?

A. I think somewhere about a year after the war, as near as I can remember.

6 Q. Mention such of the spool cottons as you recollect that you have sold thus at retail.

A. Well, there was Orrs & Macnaught, Clark's O. N. T., Clark Mile end, Willimantic, and Brooks', Coats', and Williston's, Sea island, Merrick's.

7 Q. Of which do you sell the most at the present time?

A. Merrick's.

8 Q. Which next?

A. Clark's next.

9 Q. In what proportion?

A. Well, about two-thirds of Merrick's to one-third of Clark's.

10 Q. In speaking of these various threads you refer to the six-cord, 200-yard lengths, do you not?

A. Yes, sir.

11 Q. How do you happen to be selling more of Merrick's than any other?

A. Well, I find that I can do better with Merrick's. I can
835 make more money on it by getting it in small quantities at the same price than I can of the others in larger quantities.

12 Q. Do you mean that you can buy quantities to suit your bulk of business of the Merricks at a price at which the Coats and some other companies only sell very large quantities?

(Objected to as leading.)

A. Exactly; that is just what I mean.

13 Q. What is the price at which you buy Merrick's?

A. Fifty-five cents a dozen; five and ten off.

14 Q. And you can get the Coats and other threads at that price if you take a large enough quality, can you?

A. Yes, sir.

15 Q. By retail do you mean that you sell to the ordinary housewife and consumer generally by the single spool or quantities less than a dozen?

A. Yes, sir.

16 Q. Who are the companies that require the largest quantity to be bought for the favor of the lower price at which the Merricks sell you the smaller quantity? Mention them.

A. The Coats and the Willimantic, Clark's O. N. T., and Mile-end.

17 Q. Is it your understanding that these companies unite with each other for any purpose? If so, what is your understanding?

(Objected to as incompetent and immaterial.)

A. I understand that they combined together to keep up the price of spool cotton.

18 Q. From your experience in the use and sale of Merrick's six-cord cotton what have you to say as to its quality as compared with, say, Coats'?

(Objected to, as the witness has not been shown to be qualified to testify on this point.)

A. Equally as good in every respect.

836 19 Q. Have you used them as well as sold them?

A. Yes, sir; I have used them myself and sold them.

20 Q. In your own business which do you have the most demand for?

A. Of the two; of Merrick's.

21 Q. Which does the average trade that you sell to prefer, Coats' or Merrick's?

A. Merrick's.

22 Q. At what price do you sell Merrick's per spool?

A. At five cents per spool.

23 Q. How do you account for the large sale and use of Coats' thread in this country?

A. On account of the name being long in the market.

24 Q. Is it easy or difficult for a new thread to get a foothold in the market?

A. It is difficult.

25 Q. What means do thread-makers resort to for this purpose?

A. They have advertised by giving circulars and signs and cabinets.

26 Q. To what extent do new thread-makers resort to these means and what expense do they incur?

A. They go to the expense of thousands of dollars in that way.

27 Q. State whether the older and long established companies pursue the same policy.

A. They do so, more or less.

28 Q. What is the prominent feature upon all these cabinets, circulars, and advertising devices?

A. The maker of the cotton's name.

29 Q. What is the best spool cotton, six-cord or three-cord?

A. Six-cord.

30 Q. What colored label has it been the custom for thread-makers to put upon their six-cord thread during the time you have been in the business?

A. A black and gilt label.

837 31 Q. If you saw cotton thread with a black and gilt label upon the spool, would you conclude that the thread on it was six-cord or three-cord?

A. Unless I read the label I should think it was six-cord.

32 Q. If you read the label and found the words "best spool cotton" upon it, would you conclude that the thread was six-cord or three-cord?

A. I should think it must be six-cord.

33 Q. Mention the makers of six-cord thread that you have been familiar with who have used a black and gilt label upon their thread.

A. There was Orrs & Macnaught, Coats, Williston, Clark's O. N. T., and Mile-end and Merrick's.

34 Q. Would you also include Willimantic?

A. Yes; I could also include Willimantic. I have not sold so much, but I have sold it.

35 Q. What has been the shape of all these labels?

A. Round labels.

36 Q. What has been printed upon them?

A. The maker's name and the number of the cotton, the number of yards in length.

37 Q. How has the name of the cotton been printed, in straight or circular lines?

A. Round, like the edge of the label.

38 Q. During how long a time about did you sell the Orrs & Macnaught thread?

A. In the neighborhood of three or four years, as far as I can remember.

39 Q. From the time you began to sell it did you continue to sell it until it went out of market?

A. I did.

40 Q. State whether you were selling Coats' thread at the same time.

A. I was at the same time.

41 Q. State how the Orrs & Macnaught thread was regarded by your customers.

A. It was regarded as a first-class thread.

42 Q. State whether it became well known and popular.

838 A. Yes, sir; it was in full as much demand as any other thread.

43 Q. Did you know of any other dealer buying and selling it?

A. Yes, sir.

44 Q. Look at Defendants' Exhibit No. 48 and state whether you recognize in said exhibit examples of the six-cord spool thread of which you have spoken, to wit, Orrs & Macnaught, Willimantic, Williston, Coats', Clark's Mile-end, Clark's O. N. T.

A. Yes, sir; I recognize them all.

45 Q. How do your customers know one thread from another?

A. By examining the label on the spool.

46 Q. How does that enable them to tell?

A. By reading the maker's name.

47 Q. How do they ask for thread when they want any particular kind?

A. They ask for a spool of cotton of a certain maker's name.

48 Q. When you were selling Coats' thread did you to some extent sell the numbers above 100?

A. Yes, occasionally, to some extent.

49 Q. Did you ever notice any difference between the labels on the numbers above 100 and those below except in the number of the thread?

A. I do not remember to have noticed any.

50 Q. Of how many cords is Coats' 200-yard spool thread made, as you understand it?

A. Six-cord.

51 Q. In all the numbers?

A. As I understand it.

52 Q. Do you have inquiries for Coats' thread sometimes. And, if yea, state what you do in such cases.

A. I do have inquiries occasionally. I look to see if I have it. If I have not I propose some other six-cord thread.

53 Q. Did you ever know of anybody's being deceived, taking Merrick's for Coats' and thinking that they had Coats'?

839 A. I never knew of anything of the kind.

54 Q. How likely do you think such a thing to occur?

(Objected to as incompetent and immaterial.)

A. I should think it would be very unlikely, indeed.

55 Q. Would a salesman, in your judgment, be likely to sell Merrick's thread for Coats', thinking that he was selling Coats'?

(Objected to as incompetent and immaterial.)

A. He could not do such a thing if he was a fit person to sell such goods.

56 Q. Taking all the numbers of Merrick's six-cord thread as they appear in Defendants' Exhibit No. 48, state what is the most prominent thing on the spool head.

A. The most prominent I find is the maker's name, as I see them.

57 Q. Which, in your judgment, is the plainer, black letters on a gilt ground or gilt letters on a black ground?

A. Black letters on a gilt ground.

58 Q. What do the words "best six-cord" mean?

A. It means that the thread is made of six strands or cords wound into one.

59 Q. What does the number on the label mean?

A. It means the thickness or size of the thread.

60 Q. What does the number stamped in the wood, upon the Coats spool, for instance, mean?

A. It means the number or size of the thread, the same as on the label.

61 Q. Do you consider it an advantage to have the number thus appearing in the wood?

A. Yes, sir; it is an advantage both to the retailer and consumer of the thread.

62 Q. How?

840 A. In case the labels get lost off the spool, or the number torn off, it is a great advantage to have the number stamped or embossed in the wood.

63 Q. Which is more permanent, the number in the wood or the number on the label?

A. The number on the wood is more to be depended on.

64 Q. And is it likely to last longer?

A Yes, sir; most certainly.

65 Q. What is the advantage, if any, of the numeral in the wood appearing several times?

A. It accommodates a person looking for the number; they don't need to turn the spool so much to quickly see the number.

66 Q. And this is true whether the label be on or off, is it not?

A. Yes; just the same.

67 Q. Do you know of any better thread than six-cord thread?

A. No, sir.

68 Q. Do you sell any three-cord 200-yards spool thread; if so, at what price?

A. I believe I have, some, and I sell it at three cents per spool.

69 Q. What do you consider the most important characteristic of the most excellent thread?

A. The maker's name.

70 Q. And is that always to be found both upon the spool and upon the boxes containing the spools, as well as upon the cabinets and other means by which the thread becomes known?

A. Yes, sir; it is always prominent.

And the witness, being cross-examined, further says:

71 X Q. Give me the year when you first went into the furnishing and fancy goods business.

A. I think it was in the neighborhood of 1866.

72 X Q. Where were you located then?

A. In Newark, New Jersey, at No. 22 Parkhurst street.

841 73 X Q. State, up to the present time, since you were in Newark, the various places where you have been engaged in business and the length of time you remained in each place.

A. I could not tell those things exactly; I might make some mistake about it, even in the first year or two after I went into business.

74 X Q. How long did you stay in business at Newark?

A. I couldn't say exactly. I think I was there two or three years; it runs in my head that I had a lease there for three years. I can't say that I stayed there so long as that.

75 X Q. Where did you go after you left No. 22 Parkhurst street, Newark?

A. After I left there I went to No. 90 Third avenue, New York city.

76 X Q. How long did you stay there?

A. I think I stayed there five or six years. I think I stayed there six years; five or six years, I think.

77 X Q. Where did you move to from there?

A. I moved to No. 76 Third avenue.

78 X Q. How long have you been there?

A. I have been there, I think, over six, if not seven, years.

79 X Q. Have you above mentioned all the different places where you have been in the fancy-goods business since starting it?

A. I have; all of them.

80 X Q. In what business was you before starting in the fancy-goods business?

A. In the sewing-machine business.

81 X Q. For how long and where?

A. I think about nine years for the Singer Manufacturing Co. as a mechanic, in New York city.

82 X Q. Have you had any partners in your fancy-goods business?

A. No, sir; it has exclusively been my own business.

83 X Q. In what year did you first begin to sell Merrick's thread?

842 A. I don't remember the exact year. I believe I have been selling it for three or four years.

84 X Q. Did you sell it before you moved to No. 76 Third avenue?

A. No, sir.

85 X Q. Whose did you sell the most of before moving to 76 Third avenue?

A. Clark's O. N. T. and Clark's Mile-end.

86 X Q. You never dealt much in Coats'?

A. No, sir; not much.

87 X Q. Do you know in what locality the principal sales of Coats' thread are?

A. No, sir; I do not.

88 X Q. In equal quantities cannot you buy Merrick's thread cheaper than Coats'?

A. Yes, sir; I have always understood so.

89 X Q. State whether you sell Merrick's and Coats' spools at the same price.

A. Yes, sir; in all cases I do.

90 X Q. Then you make more profit by selling Merrick's than you can make by selling Coats'. Is that not true?

A. Well, yes, sir. I find that I do not have to keep such a stock of cotton. I do not like to keep so much on hand.

91 X Q. Do you know anything of your own knowledge as to the arrangement on which the Coats, Willimantic, and Clarks sell thread?

A. I never bought any cotton on their arrangements. I understand that they sell a great deal cheaper in larger quantities.

(Last clause of answer objected to as hearsay and not responsive.)

92 X Q. You never bought it from them yourself in large quantities, did you?

A. No, sir.

93 X Q. What, in your opinion, determines the quality of six-cord cotton as being better or worse?

A. Its strength and elasticity and smootness and evenness.

843 94 X Q. Anything else?

A. Probably its softness might be put in.

95 X Q. Anything else?

A. I don't know, unless its durability, and that means its strength and elasticity.

96 X Q. Have you now mentioned all?

A. Yes; I think so; I think I have.

97 X Q. What test did you ever put Merrick's cotton to to determine whether it possessed these properties you have mentioned?

A. I have tried it on the sewing machine and sewed cloth and cotton goods. I have seen it used by others the same way and it seemed to give entire satisfaction.

98 X Q. What tests have you ever put Coats' to?

A. I can't say that I have tested Coats' in that way, but I have Clark's O. N. T.

(Last clause of answer objected to as irresponsive.)

99 X Q. Don't you encourage the sale of Merrick's cotton in preference to Coats' as making a larger profit on it?

A. Well, partly in preference to any other cotton, because I know it is a very good cotton.

100 X Q. Don't you know that the sale of Coats' thread in this country is very much larger than that of Merrick's?

A. I do not know it. I have heard it said.

101 X Q. You believe it, don't you?

A. Yes, sir.

102 X Q. You say it is difficult for a new thread to get a foothold in the market. Would it be likely to help or would it injure such a new thread if the appearance of the spools, etc., on which it was sold was similar to that of an old and well-known brand?

A. I do not think it would make any difference, as parties who want special makes examine the spool and read the maker's name.

103 X Q. How about the case of parties who did not want special makes?

844 A. Well, in such cases as that I would sell what I had to suit them, as long as I knew it was a good article.

104 X Q. Do you mean to testify that all six-cord cotton has a black and gilt label upon it?

A. No, sir; only the principal makers, as far as I know of.

105 X Q. Will you testify that all the principal makers use a black and gilt label for their six-cord thread?

A. Well, I could not say that certainly. There may be some that I don't know much about. I do not sell all the six-cord thread.

106 X Q. Did you ever investigate so as to see how many threads are in what is called six-cord thread?

A. No, sir.

107 X Q. Your sales of Coats' thread in numbers above 100 have been very small, have they not?

A. Very small, indeed, for some considerable time.

108 X Q. Are not those numbers above 100 used for a different purpose from the lower numbers?

A. Yes, sir; most always. I believe them to be used on fine underwear—fine cotton underwear.

109 X Q. If you looked at the Coats label and saw that all up to 100 had the words "best six-cord" on them, while those above 100 had the words "best spool cotton," would not that lead you to think that the numbers above 100 were not six-cord?

A. Yes, sir; if I observed that I should certainly think they were not six-cord—if I observed it.

110 X Q. How long have you been selling Coats' cotton in those higher and lower numbers?

A. I don't suppose I sold it more than a couple of years in those high numbers. In the low numbers I must have sold it six or seven years.

111 X Q. And during that time up to to-day you have never noticed the difference in the words on the label?

A. No, sir; never, that I know of. I took it for granted it was six-cord.

845 112 X Q. Then when spool-thread labels are very similar in appearance your experience would lead you to say that the lettering is not so apt to be noticed, is it?

A. Well, not any further than the maker's name and the number of the cotton.

113 X Q. If the labels on spools of different makers were very similar would not that, in your opinion, make it easier for an un-

scrupulous dealer to palm off one brand of thread for another on a customer who was ignorant or in a hurry?

A. Not generally, because they would probably send it back if they were imposed on so, and they generally look for themselves to see that the number and name is correct.

114 X Q. As you look at the spool in the case, Defendants' Exhibit No. 48, do you find any except the Merrick spool and the Coats spool which have the number indicating size embossed on the wood of the spools?

A. No; I don't see any other.

115 X Q. Did you ever in the trade see any except those two brands of cotton with the numbers indicating size embossed on the spool?

A. I don't think I have noticed any others embossed on the spool.

116 X Q. In putting the Merrick spools on the spindle of a sewing machine it would not destroy the number indicating size on the label, would it?

A. Well, it might; it might deface the number so that it could not be distinguished.

117 X Q. It would surely do so in the Coats spools, would it not?

A. Yes; it certainly would.

118 X Q. You say you can buy the Merrick thread cheaper than Coats' thread in lots of the same quantity; this applies to the numbers above 100 as well as the others, does it not?

A. Yes.

Adjourned to 11 o'clock, Thursday, June 16, 1887.

846 NEW YORK, *June* 16, 1887.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of cross-examination:

119 X Q. When did you stop selling the Orrs & Macnaught thread?

A. Well, it was at the time when I found that I couldn't get the numbers, the desirable numbers, any more; as to the date I can't remember that.

120 X Q. About how many years ago as near as you can get at it?

A. Well, probably I had some of the thread up to within five or six years ago—that is, odd numbers; I didn't, of course, have any stock; I didn't pretend to keep it any more; probably a few odd numbers; I may have sold a spool or two later than that—a year or so later; it lasted a considerable time after I stopped buying it.

121 X Q. Is that thread on the market now—I mean Orrs & Macnaught?

A. Not that I know of; I never hear of it in business.

122 X Q. What is the annual amount of your sale of spool cotton at present?

A. I do not know, sir; that is a thing that I have kept no account of at all; I simply buy it as my stock seems to run down without regard to the amount I sell.

123 X Q. Then you can't give me your average annual sales for the past ten years?

A. No, sir; I could not.

124 X Q. And you can't tell me how much of Merrick's thread you sell?

A. No, sir; I could not tell that.

125 X Q. Nor how much of Coats' or Clark's or any other of the makers you have mentioned?

A. No, sir; I could not tell.

126 X Q. Then how do you know that you do sell about two-thirds of Merrick's to one-third of Clark's, as you have stated?

847 A. Because I give Merrick's the preference in selling, and I do not buy Clark's so often and do not sell it so often nor any other maker's, and, in my judgment, that is the way it averages.

127 X Q. Then you don't mean that for an exact proportion of your sales of Merrick's and Clark's as compared, but only a guess at what the proportion is?

A. No; I don't mean it is exact. I found that I could do better with Merrick's and tried to not sell any other cotton.

128 X Q. By doing better you mean you could make more money on the Merrick's, don't you?

A. I could do better on a small investment of money; make more money on a small investment; not be obliged to carry so large a stock.

129 X Q. Who do you buy your Merrick's thread from?

A. From Mr. H. F. Palmer, 23 Thomas street. I understand he is the agent for the Merrick Thread Co.

130 X Q. Who do you buy your Coats thread from?

A. I occasionally buy it, probably with other goods, from Spelman Brothers, or some other notion house, such as Calhoun, Robbins & Co. I buy it so seldom that I can hardly remember—that is, the Coats.

131 X Q. You could not buy Coats' thread direct from their selling agents in New York, could you?

A. I do not know, sir.

132 X Q. You did not sell as much of Orrs & Macnaught's thread as you did of the other brands then in the market, did you?

A. I think I did, or nearly as much.

133 X Q. Did you not sell more of Clark's than of Merrick's for many years?

A. I did.

134 X Q. Up to what time?

A. Well, up to the time when the city traveler called in

848 and showed me Merrick's cotton and explained its merits in comparison with other cottons and the price I could buy it at; then I began to buy it right away, and soon, some time afterwards, stopped buying almost any other cotton and offered it for sale when anybody asked for cotton; the date I could not remem-

ber; lately, for business reasons, I keep a small stock of Clark's O. N. T. on account of other neighboring stores.

135 X Q. In the trade you would consider yourself a small dealer in spool cotton as far as amount of sales go, would you not?

A. In spool cotton at present; yes, sir.

136 X Q. But you can't give your annual sales of spool cotton, either total or specific makers?

A. I cannot; no, sir.

And being further examined in redirect by Mr. WITTER:

137 R. D. Q. Can you safely say that you sell as many as fifteen or twenty dozen of the Merrick spool cotton in question per week?

A. I don't think I could; not always; sometimes I probably do so; at other times, trade being different, I don't sell so much; I believe I have done so.

138 R. D. Q. Would ten or fifteen dozen per week be a pretty fair expression?

A. Yes; I think that would cover the amount of my sales.

139 R. D. Q. That would be as near as you can estimate it, would it?

A. Yes, sir.

PHILIP M. DEVIN.

Subscribed and sworn to before me this 16th June, 1887.

WM. H. KENYON, *Notary.*

849 GEORGE P. BALDWIN, a witness of lawful age, produced on the part of defendants, being by me first duly cautioned and sworn to speak the truth, the whole truth, and nothing but the truth in the matter in controversy herein, and being examined by W. C. WITTER, Esq., counsel for defendants, deposes and says:

1 Q. What is your name, age, residence, and occupation?

A. George P. Baldwin; thirty-two years of age; reside in Newark, N. Y.; occupation, a jobber of notions and fancy goods.

2 Q. Including spool thread in quantity?

A. Yes, sir.

3 Q. How many years have you been engaged in buying and selling spool thread of the best quality and what threads have you so bought and sold?

A. In 1868 and 1869 and 1870 I sold spool cotton; from 1873 to the present time I have bought and sold spool cotton—Clark's O. N. T., Clark's Mile-end, Coats', Merrick's, Brooks'. I have reference to six-cord thread.

4 Q. Do you recognize the paper; "Def'ts' Exhibit No. 49, Coats' Bill-head No. 3," which I hand you? If you do, state what it is.

A. I do; it is a bill from Auchincloss Brothers to our firm for 100 dozen J. & P. Coats' best six-cord 200-yd. thread, 8 to 150, dated September 11th, 1883.

5 Q. Did you make that purchase yourself?

A. I made the purchase for the firm.

6 Q. Will you please produce the case of 100 dozen, which you so bought, as specified in that bill?

A. I produce the same.

(Defendants' counsel puts the said case in evidence, and it is marked "Defendants' Exhibit No. 58, 100-Dozen Case Coats' Assorted Six-cord Thread, W. H. K., notary.")

7 Q. Was that case of thread a standard case of assorted thread such as the agents of the Coats' people sell in the regular course of trade?

850 A. I believe it was.

8 Q. How many dozens of thread did that case contain of numbers higher than 100?

A. 10 dozen.

9 Q. And do all the boxes that contain that 10 dozen bear the words "best six-cord spool cotton" upon them?

A. Yes, sir.

10 Q. What do you understand those words upon those boxes to mean?

A. That the thread inside is six-cord thread.

11 Q. Up to how recently was it your understanding that Coats' thread in numbers higher than 100 was six-cord and how did you become informed on the subject?

A. About January my attention was called to the affair by Mr. H. F. Palmer.

12 Q. And up to that time you supposed that thread was six-cord, did you?

A. I did.

13 Q. What colored labels, so far as your experience goes, have been habitually used upon spools of 200-yd. six-cord thread?

A. Black and gilt.

14 Q. Of what shape?

A. Circular.

15 Q. Bearing what information upon the label?

A. The manufacturer's name, the size of the thread, and the length.

16 Q. What has been the most prominent thing upon the label in all cases?

A. The name of the thread, I should say.

17 Q. What next?

A. Well, I think the number.

18 Q. Which do you think is the plainer way of putting the name of the thread upon the label—black letters on a gilt ground or gilt letters on a black ground?

A. I prefer black letters on a gilt ground.

19 Q. Did you yourself ever deal in a thread known as Orrs & Macnaught's?

851 A. I sold it as a clerk in 1868. I think that's the date.

20 Q. Do you recollect that thread as bearing a black and gilt label, circular in shape, with the name Orrs & Macnaught and the number upon it?

A. That is my recollection of it.

21 Q. Look at Defendants' Exhibit No. 48 and state whether you recognize the examples of the various threads you have mentioned as correct examples of the said spools of six-cord thread, to wit, Clark's O. N. T., Clark's Mile-end, Coats', and Orrs & Macnaught's, and Merrick's.

A. They all appear to me to be genuine.

22 Q. And you would make the same answer as to the Willimantic, would you?

A. I would.

23 Q. Of which thread do you sell the greatest quantity?

A. Clark's O. N. T.

24 Q. Which next?

A. I think Clark's Mile-end.

25 Q. And next?

A. Well, Coats'.

26 Q. Do you know of any better cotton than six-cord cotton?

A. I do not.

27 Q. What do the words best six-cord on the label of the Coats thread mean?

A. I suppose they have reference to the number of strands in the thread.

28 Q. What does the number in the center of the label mean?

A. That designates the size of the thread.

29 Q. What do the numbers in the wood outside of the label mean?

A. They designate the size of the thread.

30 Q. Which is the more permanent, the wooden number or the paper number?

A. I should say the wooden number.

31 Q. Considering that the wooden number appears several times, which is the more conveniently seen?

852 A. Well, I can see the number on the paper the best.

32 Q. What advantage is there in having the wooden number several times on the spool?

A. I notice that whichever way you hold the spool you can read the number right side up. That is about all the advantage I see in having it on so many times.

33 Q. Is it your experience that the paper label is sometimes lost off and sometimes obscured in whole or in part by handling, transportation, and use?

A. That is my experience.

34 Q. Do you know of any other advantage or use that the wooden numbering has or is put to except to aid the customer in readily determining the size of the thread under all circumstances?

A. I can't think of any.

35 Q. How do people distinguish threads from each other?

A. By the name on the label.

36 Q. Did you ever notice any difference in the mode of putting up and designating Coats' thread in numbers above 100 and in numbers below 100?

A. Do you refer to the spools or the boxes?

37 Q. The spools.

A. Not until I examined your exhibit to-day.

(Witness points to Defendants' Exhibit No. 48.)

38 Q. Did you ever know of any one's being deceived so that they bought or sold Merrick's thread for Coats', supposing it to be Coats'?

A. I am not acquainted with any such individual.

39 Q. Do you think it likely to occur?

(Objected to as immaterial.)

A. I don't see why it should occur.

40 Q. What expense and pains do thread-makers take to keep the name of their thread before the public?

853 A. As to the expense that I cannot say, but they take pains to distribute show-cards, picture cards with advertising matter on, also cabinets, all of which must be very expensive.

41 Q. Which brings the highest price in like number of yards, six-cord or three-cord thread?

A. Six-cord.

42 Q. At what price per spool are all the principal makes of six-cord thread sold at retail, including said Merrick's, Coats', the two Clarks', Willimantic?

A. Five cents.

43 Q. You bought the case of Coats' thread, Defendants' Exhibit A, in the regular line of business, but at the request of Mr. H. F. Palmer, did you not?

A. I did.

44 Q. Is it generally understood that some of the principal companies have a combination or understanding with each other, and if you find it is mention the companies which you understand are so allied?

(Objected to as immaterial and incompetent.)

A. It is so understood; George A. Clark & Bros., Thomas Russell & Co., Auchincloss Bros., and Willimantic; that is all.

45 Q. Thomas Russell & Co. and Auchincloss Bros. are the agents respectively for the John Clark and the Coats thread, are they not?

A. Yes; they are.

46 Q. State whether it is an easy or a difficult thing for a new thread to get a foothold in the market against the old-established names.

A. Very difficult.

47 Q. And is one of the means of introduction to place the new thread at a somewhat lower price?

A. Yes, sir.

48 Q. State whether the Orrs & Macnaught thread was a first-class thread.

A. I understood it to be first-class.

854 49 Q. What proportion of thread do you sell in numbers above 100?

A. I should say from 5 to 10 dozen in each thousand dozen; that is my estimate.

50 Q. (Questions 36 and 37 are read to witness.) What difference or differences did you then observe?

A. I notice they leave off the words "six-cord" above 100, from the label I mean, on the spool.

51 Q. Did you notice any other difference?

A. I did not.

52 Q. Did you just refer again to the Coats spools in the exhibit before answering the last two questions?

A. I did.

And being cross-examined, the witness further answers:

53 X Q. Are you related to Aaron G. Baldwin, of Newark, N. J., who testified in this case on June 1, 1887?

A. He is my father.

54 X Q. Are you George P. Baldwin of the firm of George P. Baldwin & Co., of Newark?

A. I am.

55 X Q. You speak of selling cotton in 1868, 1869, and 1870; where and for whom did you do that selling?

A. In Newark and vicinity, for A. G. Baldwin, A. G. Baldwin & Co., Seely Edsall, Seely Edsall & Co., Edsall & Price, as clerk and bookkeeper. I sold it in the store and outside. All those changes in firms took place within that time, I believe.

56 X Q. Between 1868 and 1870 how old were you?

A. I was born April, 1855.

57 X Q. Then you were from thirteen to fifteen years old at this period?

A. Yes, sir.

58 X Q. What did you do from 1870 to 1873?

A. I must have been working for Edsall & Price.

855 59 X Q. From 1873 to the present time, give the different firms with which you have been connected, how long with each, and in what capacity.

A. From 1873 to 1883 as book-keeper with Nonotuck Silk Co. of this city; since that time in my present business as a member of the firm of George P. Baldwin & Co.

60 X Q. What was the business of the Nonotuck Silk Co.?

A. Manufacturers of sewing silk and machine twist.

61 X Q. Did they manufacture spool cotton?

A. They did not.

62 X Q. Then, was not your experience while with them principally in regard to sewing silk?

A. It was.

63 X Q. Were they buyers of spool cotton?

A. No, sir.

64 X Q. Then, you never bought spool cotton for them, did you?

A. Not that I recollect of.

65 X Q. And as they neither manufactured or bought spool cotton they did not sell any, did they?

A. I don't remember of their having any transactions in spool cotton while I was with them, unless it may have been to have accommodated some customer that I don't remember of now.

66 X Q. From 1868 to 1870 can you state positively that you sold any of Merrick's thread yourself?

A. I sold thread manufactured by the Merrick Thread Co.

67 X Q. Will you state when thread was first put upon the market under the name of the Merrick Thread Co.?

A. I cannot.

68 X Q. But you are positive that you sold spool cotton under the name of the Merrick Thread Co. from 1868 to 1870, are you?

A. I sold cotton manufactured by the Merrick Thread Co. I believe their name was on the goods.

69 X Q. What have been the average annual sales of Coats' cotton by your firm from 1883 to date?

856 A. From two to three thousand dozen, I think.

70 X Q. Where is the trade to which you sell principally located?

A. In Newark and vicinity.

71 X Q. Of which make are your sales the largest?

A. Clark's O. N. T.

72 X Q. State where the principal market for Coats' cotton is in this country, if you know. I mean in what portion of the country?

A. I can only answer that question by hearsay. I am told that in the western part of New York State they are very strong.

73 X Q. Can you buy Merrick's spool thread cheaper than Coats', and do you?

A. We can and we do.

74 X Q. How much cheaper?

A. I believe it is $4\frac{1}{4}$ cents per dozen cheaper than Coats'.

75 X Q. In your firm of George P. Baldwin & Co. have you been in the habit of personally selling thread over the counter?

A. I have.

76 X Q. Has not Coats' thread a higher reputation in the trade, as a brand of thread, than Merrick's?

A. It has an older reputation. I cannot say that it is higher.

77 X Q. It is a better-known thread throughout the country, is it not?

A. I think it is.

78 X Q. State under what circumstances you purchased the 100 doz. J. & P. Coats' thread which you bought on Sept. 11, 1883, as testified to by you.

A. We received an order from Mr. H. F. Palmer for 100 doz. Coats' thread. We purchased the thread of the Messrs. Auchincloss and filled the order as we would any other similar order, charging Mr. Palmer the same price as we would any other customer.

79 X Q. Why did you not fill that order out of your stock?

857 A. Because we hadn't a case assorted that way in stock, and because it was more convenient to fill it as we did. In orders of 100-doz. lots we most always do the same way.

80 X Q. How did you know that Mr. Palmer wanted an assorted case?

A. Because he gave us the order for a case to be assorted from 8 to 150.

81 X Q. Did he give you any special instructions as to how it should be bought or say why he wanted it?

A. I do not remember anything like that; it was a simple business transaction on our part.

82 X Q. Did you go over to buy it personally?

A. My recollection of it is that we ordered it by mail.

83 X Q. Had you ever sold Mr. Palmer an assorted case of Coats' thread before?

A. I believe not.

84 X Q. Or any Coats' thread at all?

A. I do not remember, but I think not.

85 X Q. Did you ever examine Coats' thread, different numbers, to see how many strands of thread the different numbers contained?

A. No, sir; not to my recollection.

86 X Q. So you don't know as a matter of fact how many such strands any of the different numbers do contain, do you?

A. I believe I do.

87 X Q. How do you?

A. From what has been told me by parties who have examined it. I have not untwisted it lately myself.

(Answer objected to as hearsay and incompetent. Motion made to strike it out.)

88 X Q. What do the words "best six-cord spool cotton" indicate to you as the length of the cotton on a spool on which those words appear?

A. The words "six-cord spool cotton" don't indicate any length.

89 X Q. Do you ever see these words on spools except
858 those which contain a certain length of cotton among the well-known brands?

A. Yes, sir.

90 X Q. In what lengths is six-cord cotton made?

A. I have seen it in 200 yards and 1,200 yards and 2,400 yards and 12,000 yards.

91 X Q. In whose make in these lengths longer than 200 yards?

A. In Merriek's, O. N. T., and I believe that Coats and Mile-end also put it up in long lengths.

92 X Q. You can buy the numbers of Merrick's thread above 100 cheaper than Coats' corresponding numbers as well as the lower numbers, can you not?

A. Yes, sir.

93 X Q. Do you sell Merrick's cheaper than Coats'?

A. Yes, sir.

94 X Q. Can you tell me what the higher numbers of spool cotton above 100 are principally used for?

A. No, sir.

95 X Q. What proportion of your entire sales of spool cotton is of numbers above 100 as compared with the lower numbers?

A. I should say above 100 is from one-half per cent. to one per cent. of the whole.

96 X Q. Orrs and Macnaught's thread is not now in the market, is it?

A. I do not hear of it any more.

97 X Q. How long is it since you have either bought or sold it?

A. I think about 14 years.

98 X Q. Did you ever see any spools of standard six-cord thread which had the numbers indicating the size of the thread embossed upon the wood of the spool except Coats' and Merrick's spools?

A. It is my recollection that Orrs & Macnaught's were.

99 X Q. Then state whether the Orrs & Macnaught's spools,
859 as you recollect them when you sold that thread, were exactly like the Orrs & Macnaught's in Defendants' Exhibit 48.

(The witness is requested to state without referring to the spools in the exhibit.)

A. So far as I can remember.

100 X Q. In respect to what appeared on the wood of the spool, as well as other points?

A. Yes, sir.

101 X Q. Now, please look at Defendants' Exhibit No. 48 and see if you find on the Orrs & Macnaught's spools therein any numbers embossed on the wood of the spool.

A. I do not.

102 X Q. Then you were mistaken in your recollection of the exact appearance of the Orrs & Macnaught's spools, were you not?

A. I was mistaken about the numbers being embossed on the spool.

103 X Q. The number on the paper label of Coats' spool would certainly be destroyed by putting a spool on the spindle of a sewing machine. Is that not true?

A. It would be very likely to be destroyed.

104 X Q. Would the number on the paper label of Merrick's spool be so likely to be destroyed by putting it on the spindle of a sewing machine?

A. If the label were put on with great care, not so likely.

105 X Q. You mean if the label were put in the exact place on the spool where it ought to be put?

A. I mean if the label were put so that the number would not be so likely to be destroyed as if it were put over the hole.

106 X Q. Now that you have examined the Coats spools in Exhibit 48, do you see a difference in the paper labels on the numbers above 100 and the numbers up to and including 100?

A. (Witness examines the spools again.) Yes, sir.

107 X Q. What is that difference?

860 A. Up to and including 100 I find the words "best six-cord;" above 100 the words in place of six-cord are "spool cotton."

108 X Q. Would not the same number of spools of Coats' Nos. 110, 120, 130, 150, and 200 sell at the same price as the numbers below 100?

A. Yes, sir.

109 X Q. The same is true of Clark's O. N. T., Clark's Mile-end, and Willimantic?

A. Yes, sir.

110 X Q. The combination you have spoken of, as you understand it, exists for the purpose of fixing a standard price on spool cotton. Is that so?

A. That is the main feature of the combination, as I understand it.

111 X Q. Are you aware whether the thread of all numbers above 100 of all makers except the Merrick Company is three-cord thread?

A. I am not aware of that.

112 X Q. You don't know whether Clark's O. N. T. in numbers above 100 is three-cord?

A. I believe Clark makes six-cord above 100.

113 X Q. How about Clark's Mile-end in numbers above 100; is that three or six cord?

A. I don't know.

114 X Q. What have you always thought?

A. I supposed it was six-cord.

115 X Q. How about Willimantic in numbers above 100? Is that three or six cord?

A. I don't deal in Willimantic and have no opinion about it.

116 X Q. Have you never dealt in Willimantic?

A. No, sir.

117 X Q. How many cord is the Merrick thread in numbers above 100?

A. Six.

118 X Q. How do you know?

A. Well, I have never known the Merrick Company to make a statement about their thread that was not true. They stated it was six-cord. I have also untwisted it.

861 119 X Q. Were you subpœnaed to come here? If not, state how and why you happened to come.

A. I was not subpœnaed; I received a postal from Mr. H. F. Palmer stating that he wished me to call at his office at ten o'clock this a. m.; I complied with his wishes; I had no information of what he wanted of me; then Mr. Hopkins asked me to come down here and testify and I consented.

And being further examined in redirect by Mr. WITTER:

120 R. D. Q. Would you have done the same for the Messrs. Auchincloss or Coats if they had asked you to come and testify?

A. Yes, sir.

121 R. D. Q. Have you any interest whatever in this controversy on one side or the other?

A. No, sir.

95 X Q. What proportion of your entire sales of spool cotton is of numbers above 100 as compared with the lower numbers?

A. I should say above 100 is from one-half per cent. to one per cent. of the whole.

96 X Q. Orrs and Macnaught's thread is not now in the market, is it?

A. I do not hear of it any more.

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And being further examined in redirect by Mr. WITTER:

120 R. D. Q. Would you have done the same for the Messrs. Auchincloss or Coats if they had asked you to come and testify?

A. Yes, sir.

121 R. D. Q. Have you any interest whatever in this controversy on one side or the other?

A. No, sir.

122 R. D. Q. Has your testimony been any different from what it would have been had you been subpœnaed?

A. No, sir.

123 R. D. Q. Look at Defendants' Exhibit No. 8, Coats' 1883 Advertisement, under the heading, "Assortment list of J. & P. Coats' best six-cord spool cotton in 100-doz. cases." and state whether the list which I have marked with the check-mark, to wit, the list numbers 8 to 150, is the assortment bought by you and referred to in the bill.

(Objected to as not called out by the cross-examination.)

A. Yes, sir.

GEORGE P. BALDWIN.

Subscribed and sworn to before me this 16th June, 1887.

W. H. KENYON, *Notary.*

Adjourned to Thursday, June 23, 1887, at 11 a. m.

862 NEW YORK, *June* 23, 1887.

Met pursuant to adjournment.

Present: W. C. Witter, Esq., for defendant-; Samuel R. Betts, Esq., for complainant-.

WILLIAM G. PIERCE, a witness of lawful age produced on the part of the defendants, being by me first cautioned and sworn to speak the truth, the whole truth, and nothing but the truth in the matter in controversy herein, and being examined by W. C. WITTER, Esq., of counsel for defendants, deposes and says:

1 Q. What is your name, age, residence, and occupation?

A. My name is William G. Pierce; age, 41; residence, Boston, Mass.; manufacturers' agent.

2 Q. Will you state what houses you are agent for?

A. I am agent for Rosenberg Manufacturing Co., 653 B'way, N. Y.; L. Stern & Co., 101 Franklin street, N. Y.; H. Samilson, 38 E. Broadway, N. Y.; Leominster Shirt Co., Leominster, Mass.; Mack & Co., Albany, N. Y.; S. M. Forster, Fort Wayne, Indiana; The Excelsior Umbrella Co., Boston, Mass., 13 Chauncy street; C. A. Guyld, 39 Kingston street, Boston, Mass., and A. Cohen, Chauncy street, Boston, Mass.; W. N. Pelton, Hartford, Conn.; H. Goldsmith & Co., Hartford, Conn.; Smith & Murray, Springfield, Mass. There are a few other small ones.

3 Q. Are you dealing in spool thread at present for any concern; and if not, how long is it, about, since you have?

A. I am not agent for any spool cotton now, and I think it is about two years since I sold any thread.

4 Q. What six-cord thread have you sold, if any, heretofore?

A. I have sold Coats', Clark's, Willimantic, Merrick's; that's all, I believe.

863 5 Q. Have you sold six-cord thread both at wholesale and retail?

A. Yes, sir.

6 Q. State to what extent you have observed the purchase of six-cord two-hundred-yard spool thread by the retail purchaser—that is, the people who buy over the counter by the spool—and state what your facilities have been for making such observations.

A. Well, my facilities for the past twenty years selling goods to the retail dry-goods and small-ware trade over in New England, traveling from town to town, more or less, every week, and being in these stores a good share of the time has caused me to see a large amount of thread retailed by the salesmen or salesladies to the consumers.

7 Q. Have you also had or been interested in stores where thread was thus sold to the consumers?

A. Yes, sir.

8 Q. Did you ever sell the Merrick Company's 200-yard six-cord thread as agent?

A. Yes, sir.

9 Q. For how long a time?

A. For some two years, or about that.

10 Q. State your practice in thus selling Merrick's thread as agent—whether by means of samples or of specimens of the thread, or how.

A. Well, I usually sold the thread by talking up the quality of the thread as a six-cord thread, what I thought of it and what my customers who had used it thought of it, not showing any samples of the thread itself or spools of the same, but explaining the goodness of the thread, being fully two hundred yards in length, six-cord, smooth, strong, and then explaining to the purchaser that by buying the Merrick's six-cord thread of me in 100 dozen or lots or fifty dozen that I gave them a handsome cherry-wood cabinet free, which was an ornament to the store, about three thousand cards with their business printed on free, in addition to Merrick's
864 advertisement, and some five thousand paper wrappers, which they could use in doing up all kinds of small packages with their business printed on the wrappers also.

11 Q. Did these cabinets, wrappers, and cards all have the Merrick Thread Co.'s name upon them as makers of their thread; and, if so, how conspicuously?

A. They all had the name of Merrick's spool cotton in large letters—larger than the other letters on the wrappers.

12 Q. What was it your practice to have with you in thus soliciting orders for the Merrick thread?

A. Only the paper wrappers referred to.

13 Q. Like Def'ts' Exhibit No. 41?

A. Yes.

14 Q. Complainants' witness, William E. Bowker, in answer to questions 9 and 16, inclusive, purports to relate the circumstances of a sale for the Merrick Thread Co. by Wm. G. Pierce, of Boston, in 1883. Please read that account and state whether you are the Wm. G. Pierce named there and whether you sold said Bowker for the Merrick Thread Co. some of their six-cord 200-yard thread.

(Questions and answers referred to read to the witness and the witness answers:)

A. I am the Wm. G. Pierce named there, and sold him the Merrick six-cord thread.

15 Q. State all that occurred on that occasion.

A. I called on W. E. Bowker, on Hanover street, Boston, soliciting an order for the Merrick six-cord spool cotton, and explained to him the benefit to him of buying the Merrick spool cotton over and above other cottons in this way: that I would give him the thread at a stated price, with such and such discounts, and a large, handsome cherry-wood cabinet, 3,000 business cards, 5,000 wrappers, with his advertisement and name on the same, showing him the value of the wrappers to him as wrapping paper, the great
865 advantage of his advertisement on the same; also the same on the card, together with the cabinet and extra discounts on the thread was of so much advantage to him, together with the thread, which I think equally as good as any other six-cord thread in the market, and that I had sold his brother the same thread on the same inducements; that he gave me an order for one hundred dozen, showing him a sample of the wrapper which he would receive.

16 Q. Did you show or have with you at that or any other sale to Mr. Bowker any specimens of the Merrick thread?

A. No; no samples or specimens of the thread in any form.

17 Q. I now read to you questions and answers 29, 30, and 31 of complainants' witness, P. Joseph O'Keefe, and ask you whether you are the W. G. Pierce, of Boston, named there.

(Questions and answers read.)

A. I am that Wm. G. Pierce.

18 Q. And do you remember the occasion referred to?

A. Yes.

19 Q. Did you on this occasion have any samples or specimens of Merrick's thread with you or show any?

A. No, sir.

20 Q. Did the conversation or dealing with Mr. O'Keefe differ in any material respect from your conversation and dealing at the sale to Mr. Bowker, in so far as the character of the thread or its advantages or appearances are concerned?

A. No material respect; the same in substance.

21 Q. Did you ever, by any expression or intimation, seek to convey to the mind of either Mr. Bowker or Mr. O'Keefe that there was any resemblance between the spools or spool heads or marking or labeling or outward appearance or dress of the Merrick thread and Coats thread?

(Objected to as leading.)

866 A. No, sir.

22 Q. Did you, in your conversation with either of these

men, refer in any way to the spool, spool heads, labels, marking, or outward appearance of either of those threads?

(Same objection.)

A. Nothing.

23 Q. Would anything you said warrant, in your judgment, any conclusion on the part of either of those men that the Merrick resembled the Coats in its spools, spool heads, labeling, marking, outward appearance or dress?

(Same objection.)

A. Nothing.

24 Q. What did you speak of and refer to in these interviews in connection with the thread?

A. The quality of the thread, the strength of the same, smoothness of the same, price, discount, cabinets, wrappers, and cards.

25 Q. Did Mr. Bowker make any remark to you to the effect that Merrick's "looked very much like Coats'"?

A. Nothing.

26 Q. Do you in fact think it does?

A. I do not.

27 Q. Where Mr. Bowker says that you showed him samples or specimens of the Merrick article is he mistaken?

A. He is.

28 Q. What was the cabinet given to be used for in your dealings as agent for the Merrick Thread Co.?

A. To keep the Merrick thread in.

29 Q. Was it furnished for the purpose of keeping any other in than the Merrick?

A. No, sir.

30 Q. Of how many cords is the best spool cotton made?

A. Six.

867 31 Q. Of how many cords is Coats' 200-yard spool cotton?

A. Six-cord.

32 Q. Is that true of all the numbers from 8 to 200, as you have understood it?

(Objected to, as no grounds of actual knowledge of the witness is shown.)

A. It is six-cord from 8 to 100, three-cord from 100 to 200.

33 Q. When did you first learn this?

A. Yesterday.

34 Q. And up to yesterday had you always supposed that all the numbers were six-cord?

(Objected to as immaterial.)

A. Yes, sir.

35 Q. Which is better, six-cord or three-cord?

A. Six.

36 Q. What difference in price is there between six-cord and three-cord thread, about?

A. A large discount; I should think 40 to 50 per cent.; I am not positive.

37 Q. Did you ever notice any difference between the marking and labeling of Coats' 200-yd. thread between the numbers 8 to 100, inclusive, and the numbers higher than 100?

A. None.

38 Q. Of how many cords would you take a 200 yard thread to be that should bear the words "best spool cotton" on a black and gold circular label?

(Objected to as immaterial.)

A. Six-cord.

39 Q. What colored labels has it been the custom for makers to use, during your experience, upon one end of their 200-yard six-cord thread?

A. Black letters on gold ground-work and gold letters on black ground-work—that is, gilt letters.

40 Q. Look at the spools in Defendants' Exhibit 48 and
868 state which you think is plainer, black letters on a gold ground or gold letters on a black ground?

A. Black letters on a gold ground looks plainer to me.

41 Q. How are the different threads in trade distinguished from each other and how are they asked for?

A. By the name—the name of the thread.

42 Q. Illustrate what you mean.

A. A customer calls for a spool of cotton by calling for Coats' No. 40, white; Clark's O. N. T. or Mile-end or Willimantic or Merrick, just specifying the name of the thread only and the number and color.

43 Q. Did you ever hear or know of Coats' thread being asked for or distinguished from other threads by any means except the name?

A. No.

44 Q. Did you ever hear or know of its being claimed or advertised or in any way made known that the stamping in the wood of the Coats spools formed a trade-mark or any part of a trade-mark or any means by which the Coats thread was known from other threads?

(Objected to as immaterial.)

A. No; you mean the stamping in the ends of the wood?

45 Q. Yes; that is what I mean.

(Same objection.)

A. No, sir.

46 Q. What is the use of the number in the wood?

A. To designate the number of the cotton—the size.

47 Q. Why does it appear there several times?

A. For the convenience of seeing at a quick glance the size of the thread.

48 Q. State whether, in your judgment, retail buyers, using such

care as people buying spool thread by the spool do in fact use, would be likely to make the mistake of taking Merrick's for Coats'
869 when they wanted Coats' by reason of any resemblance between the two.

A. No.

49 Q. How do you regard the quality of the thread of the principal manufacturers as compared with each other, say, for example, Willimantic, Merrick, Coats', the two Clarks, all of which you have mentioned, up to and including 100?

A. I think they are all about the same quality of thread.

50 Q. And they all bring the same price—that is, 5 cents a spool—at retail, do they not?

A. So I understand.

51 Q. How often are you in the store of Mr. Bowker, above referred to?

A. Sometimes three times a day, sometimes once a day, twice a week, once a week, or once in three weeks as the case may be.

52 Q. On business?

A. Yes, on business.

53 Q. Did he ever tell you that he had been examined as a witness in this case?

A. He has.

54 Q. Did he tell you the substance or what he had sworn to touching what occurred at the sale of Merrick thread about which you have been asked?

(Objected to as immaterial and incompetent.)

A. He did.

55 Q. State whether he solicited you to support him in his statements as testified to.

(Same objection.)

A. He urged me to go and see Coats & Co., in Boston, and said he could get me $50 for coming to New York and testifying in respect to their thread, as they were having a lawsuit with the Merrick Thread Co., and urged me to come on and get the $50 and do all I could to injure the Merrick Thread Co., as he had just been
870 paid $35 for going to New York and testifying in respect to buying the Merrick spool cotton of me.

(Answer objected to as incompetent and immaterial.)

56 Q. You say that he told you what he had testified to in New York touching the sale. Did you state to him whether you regarded his testimony as truly given or not?

(Same objection.)

A. He told me what he said he testified to in respect to the sale made by me to him of Merrick thread, and I told him he knew that he told that which was not true.

57 Q. You have reference in this answer to Bowker's assertions

regarding the resemblance of Merrick's to Coats' spools of thread, have you?

(Same objection.)

A. I have reference to his assertion as to selling the Merrick thread for Coats' thread on account of the looks of the spools and labels—not the cotton.

58 Q. When you gave him to understand that he had testified wrongfully what reply did he make in substance, if any?

(Same objection.)

A. He replied that, "Well, he had got his $35 anyway, and he would do what he could to injure the Merrick Thread Company."

59 Q. And you declined to give the testimony desired, did you?

(Same objection.)

A. I told him that I could not testify as he had and tell the truth; that if I should go on for Coats' Co. I should do them more harm than good, as what he testified to was false—that is, as representing my sale to him.

871 60 Q. Have you any interest in the issue of this suit?

A. Nothing.

61 Q. You have come here from Boston at the request of the defendants, without subpœna, to testify what you know regarding the subjects about which you might be questioned, have you?

A. Yes.

And being cross-examined by Mr. BETTS, the witness says:

62 X Q. When did you last sell any Coats thread?

A. Some three years ago, I should think.

63 X Q. For how long a period have you sold thread?

A. About twenty-five years.

64 X Q. When did you first sell any of Merrick's 200-yards six-cord thread?

A. About January 1st, 1883.

65 X Q. When did you first sell any of Coats' 200-yards thread?

A. About 1862.

66 X Q. Why did you stop selling Merrick's thread?

A. I have other accounts that were giving me more business and that I was making more money on, and being a commission merchant I worked on the class of goods that paid me the best.

67 X Q. Was Merrick's thread sold cheaper during the time that you dealt in it than Coats' thread by the Merrick Co.?

A. Sold cheaper to the retail dealers that I sold to in the way of discount.

68 X Q. Coats', Clark's, and the Willimantic all sold at the same price, did they not?

A. So I understood.

69 X Q. When you say you sold six-cord thread at retail what do you mean?

A. At a retail store which I was running myself at Springfield, Mass.; also at a store 36 Cambridge St., Boston, Mass.

70 X Q. At what period did you sell at retail at that store at Springfield?

872 A. About five or six years ago.

71 X Q. Did you sell any Merrick thread at retail there?

A. No.

72 X Q. At what period did you sell at retail at the store, 36 Cambridge St., Boston, Mass.?

A. Two and three years ago; about two years ago.

73 X Q. Did you yourself personally sell thread in that store at Cambridge St., Boston, over the counter?

A. I did, some.

74 X Q. Did you ever sell any Merrick thread there?

A. I did.

75 X Q. What proportion of your sales of Coats' thread on the average was of the higher numbers above 100?

A. Very small.

76 X Q. Can't you give a proportion approximately?

A. Not over 5 per cent.; very small; perhaps not that.

77 X Q. What proportion of Merrick's thread was in numbers over 100?

A. Not over 5 per cent.; perhaps not that.

78 X Q. Is it not customary for agents or drummers selling thread to carry samples of it and show them?

A. I think it is. I will amend that in a measure; it is not where drummers are selling to retailers thread that they have always sold them before.

79 X Q. Was not the Merrick thread in the years from 1883 to 1885 a new thread on the market, compared with Coats' and Clark's O. N. T. and Mile-end?

A. In the six-cord grade I think it was.

80 X Q. And you only began to sell this Merrick thread in the year 1883, as I understand you?

A. About the first of Jan., 1883.

81 X Q. What was the date of that interview with Mr. Wm. E. Bowker when you had the conversation in the course of

873 which he says you told him he could sell Merrick's thread half the time for Coats'?

A. In the spring of 1883.

82 X Q. Was that conversation the first that you had with Mr. Bowker in regard to Merrick's thread, in trying to sell him that thread?

A. The first conversation was about the first of Jan., 1883, I should think.

83 X Q. Was that the conversation you refer to where he says that you told him he could sell Merrick's thread half the time for Coats'?

A. No, sir.

84 X Q. In the course of your selling thread as agent or drummer do you say that you never showed specimens or samples of the spools

of thread to those whom you were trying to induce to purchase—I mean of any thread?

A. Not in any case where they had ever bought before.

85 X Q. Well, did you show them samples or specimens in cases where they had not bought the thread before?

A. Always when they came to my office, and very seldom when I went to their place of business.

86 X Q. But you did sometimes show customers specimens or samples when you went to their place of business?

A. I did.

87 X Q. Do you remember what you did show Mr. Bowker at these interviews in the winter and spring of 1883 in trying to get him to give you an order for Merrick thread?

A. I showed him the wrapper and a sample of business card.

88 X Q. Had not the Merrick Co. in the beginning of 1883, when you first began to sell their thread, or about that time, provided you with any specimens or spools of their thread?

A. Any quantity of them.

89 X Q. Where did you keep those specimens or samples of Merrick's thread?

A. In the drawers inside of the cabinet in my office.

874 90 X Q. Don't you remember showing them to persons who came to your office when trying to introduce the Merrick thread thoroughly to their notice?

A. I did.

91 X Q. How many different conversations did you have with Mr. Bowker in the winter and spring of 1883 up to the time he bought that cabinet of Merrick thread through you?

A. It is impossible to tell; anywhere from one to 25 times, more or less.

92 X Q. Can you say that Mr. Bowker, up to the time of buying this Merrick thread cabinet, had never seen a specimen of Merrick thread?

A. Not from my hands.

(Objected to as irresponsive.)

93 X Q. (Question repeated.)

A. I can't say; but he had not from my hands.

94 X Q. Can you say that in none of his conversations prior to his buying that Merrick cabinet any mention was made of Coats' thread as compared with Merrick's?

A. Coats', Willimantic, and Clark's were all talked of.

95 X Q. Was Mr. Bowker familiar with the appearance of the Coats spool, to your knowledge?

A. I don't know.

96 X Q. Don't you know whether he was selling Coats' thread prior to that time?

A. I do not.

97 X Q. What was said when Coats' thread was talked about in comparison with Merrick's in these conversations?

A. I told Mr. Bowker I considered Merrick's thread as good as

Willimantic, Coats', or Clark's, or theirs as good as Merrick's—one as good as the other, so far as the quality was concerned.

98 X Q. What did he say comparing Coats' with Merrick's in any of this series of conversations?

A. He said he thought they were all about the same thing—one as good as the other.

875 99 X Q. You could not undertake now to give in detail all he said or all you said in these conversations as to comparisons between Coats and Merrick thread, could you?

A. I can give every word that was said.

100 X Q. Would you be willing to swear that Bowker never said to you that Merrick's thread looked very much like Coats'?

A. He never did.

101 X Q. How long did you continue to sell Merrick's thread to Bowker?

A. I think two or three sales.

102 X Q. When was the next sale to him after the sale of that cabinet in the spring of 1883?

A. I cannot remember; a few months.

103 X Q. When was the next sale after that?

A. I am not positive how many sales there were, but should think he bought 2 or 3 sales after that first time, but I could not tell positively.

104 X Q. When was the last sale of thread you made to him—I mean Merrick's thread?

A. I should say 30 or 60 days before the Merrick Co. put a keeper in his store. I cannot give the date without the books. It was in 1883 or 1884. I should think it was the fall of 1883 or spring of 1884.

105 X Q. Didn't you sell Bowker any thread in the summer of 1884?

A. I cannot remember. I should have to refer to the books for that.

106 X Q. How much Merrick thread did you sell him altogether?

A. I should think from 150 to 300 dozen.

Adjourned to Friday, June 24, 1887, at 11 a. m.

876 NEW YORK, *June* 24, 1887.

Met pursuant to adjournment.

Present: W. C. Witter, Esq., for defendant-; Sam'l R. Betts, Esq., for complainant-.

WILLIAM G. PIERCE, being further cross-examined, says:

107 X Q. Did you ever make any tests of the Coats thread to see of how many strands it was made?

A. No, sir.

108 X Q. Or of the Merrick's thread?

A. No, sir.

109 X Q. Did you ever make any comparative tests of the Coats and Merrick thread, as to which was the best in quality, etc.?

A. No, sir.

110 X Q. Has not the Coats thread a higher reputation in the trade as a brand of thread than the Merrick thread?

A. Not that I know of.

111 X Q. Is it not a better known brand of thread than the Merrick?

A. It is a longer known thread, but not any better, that I know of?

112 X Q. Are not the sales of Coats' thread very much larger than the Merrick's in this country?

A. Not that I know of.

113 X Q. Do you know anything about the relative qualities of thread of the different makers sold in this country?

A. No, sir.

114 X Q. Were you a regular agent for the Merrick thread at any time?

A. Not from the factory direct, but through their agent in Boston.

115 X Q. For how long?

A. About two years.

116 X Q. Have you been a regular agent for any other threads; and, if so, what ones?

A. No, sir.

877 117 X Q. Up to what time have you had business dealings with Mr. Bowker?

A. Up to about the first of this month, two or three weeks ago. In fact, I am dealing with him all the time. That is the last sale I refer to.

118 X Q. When was it that he told you that he had been examined as a witness in this case?

A. Just after he returned from New York, after being here as a witness.

119 X Q. Give me the year and month when he told you.

A. I should think it was 1886. I cannot give the month.

120 X Q. In what part of 1886, as near as you can recollect?

A. That I can't remember. From memory I should say the first part of 1886 and perhaps in 1885. I think it was the first of 1886 or a trifle before that. It might have been in 1885. I should say in place of 1886—I should think in 1885. I think now it was in 1885.

121 X Q. Where was this conversation?

A. In his store on Hanover street, which he occupied previous to the one he is in now.

122 X Q. Did he read you his testimony or show you any copy of it?

A. No, sir.

123 X Q. Did he tell you that he had testified that when you were first trying to sell him the Merrick thread he had told you it looked very much like Coats', and that you had replied and said that he could sell it half the time for Coats'?

A. He told me that he had testified that I told him that it looked

like Coats', and I told him in return that I had told him nothing of the kind.

(Last clause of answer objected to as irresponsive.)

124 X Q. Are you distinct in your recollection of this conversation, and that he said he had testified that you told him it looked like Coats'?

878 A. Yes, sir.

125 X Q. Do you remember his using substantially those words?

A. Yes, sir.

126 X Q. The fact is that he did testify that it was he that said it looked very much like Coats' and that you had said, "You can sell it half the time for Coats'." Do you still say that he told you in regard to what he had testified to was substantially in the words you have given?

A. He told me what he had testified to as what I told him in respect to selling the Merrick thread as Coats' thread on account of the looks of the same; as being so near like Coats' that he could sell it as Coats' thread.

127 X Q. Who represent Coats & Co. in Boston that he urged you to go and see?

A. I don't know their names.

128 X Q. Can you explain why he thought he could get you $50 for coming to New York, while he only got $35?

A. I cannot.

129 X Q. What do you get for coming to New York to testify for the Merrick Thread Co.?

A. I have no arrangements made otherwise at all except my expenses paid and to set my name before the court in proper shape as respects the wrong done me by the Coats witnesses heretofore.

(All after the words "expenses paid" objected to as irresponsive to the question.)

130 X Q. You have made arrangements to have your expenses paid, have you?

A. They agreed to pay the expenses of my coming here.

131 X Q. And your expenses while you are kept here testifying?

(Defendants' counsel says here that the defendants do expect to pay the witness' expenses to and from Boston and while here

879 giving his testimony in this case as being a more economical arrangement than taking the testimony in Boston.)

A. I expect to receive that also—my hotel bills and my expenses back.

132 X Q. How about your time while here giving testimony; don't you expect some compensation for that?

A. I have made no arrangements for that, not even a cent.

133 X Q. I don't want you to understand that I am trying to show that you are being paid for your testimony, but I design to bring out the legitimate cost of getting you here to testify, such as

any lawyer would probably pay a witness when he takes the time of a witness from other business. Now, don't you expect some fair compensation for the two days in which your time will have been taken up giving testimony?

A. I expect nothing from any arrangements or agreements that have been made.

134 X Q. Independent of past arrangements, don't you expect something for your time?

A. I have no reason for thinking so.

135 X Q. Independent of any reason or arrangement with the Merrick Co., don't you expect something for your time?

A. I expect nothing from any cause any different from what I have testified to.

136 X Q. Don't you, as a matter of fact, expect to get something for your time while testifying here?

A. No, sir; I have no reason for answering any different.

137 X Q. How much will your expenses in coming on here, while you are here testifying, and returning amount to, if you are able to leave this evening?

A. About 12 or 15 dollars.

138 X Q. What do you regard as a reasonable compensa-
880 tion for your time for two days devoted to testifying herein, if the Merrick Co. should generously wish to give you some compensation?

A. I expect nothing except the right of knowing that my honor has been set right to the court in respect to the Coats agents having wrongly misrepresented me in this case.

139 X Q. Would ten dollars a day be a reasonably small compensation for your time for these two days, considering the other business you have on hand?

A. As far as money is concerned—there is no amount I could name in respect to payment as far as money would be concerned.

140 X Q. That amount would be little enough, wouldn't it?

A. There is no valuation, as respects money, to me in this case.

141 X Q. Mr. Bowker came on from Boston to testify without having the object of defending his reputation, which you allege, and was here as a witness for one day at least, and seems to have been willing to accept some compensation for his time, which most men get, either by previous arrangement or subsequent generosity. Do you think $35 was an extravagant amount to pay him for his expenses and loss of time and the trouble involved in a long journey?

A. I have no reason to judge what his time is worth.

142 X Q. You have intimated in your testimony that that $35 was paid him as a bribe for testifying to matters which you allege are untrue; did you mean to be so understood?

A. I mean to be understood that he told me that he was paid $35 by the Coats Co. for testifying in their suit against the Merrick Thread Co. in New York city, during which testimony he says that he testified to the above in respect to me.

143 X Q. That $35 was all he got as far as you know?

A. That is all he told me, except his expenses.

881 144 X Q. What were the expenses?

A. That I do not know, except his fare and hotel bill.

145 X Q. Did he tell you whether these were covered by the $35 or not?

A. He said the $35 was over and above expenses.

146 X Q. Would you come to New York from Boston and spend a day in testifying in this case for $35, supposing there were no personal matter of testimony about you in it like that which you say brings you on?

A. I don't think I would.

147 X Q. How many conversations have you had with Mr. Bowker during the years 1885, 1886, and 1887 at his stores?

A. It is impossible to answer; a great many.

148 X Q. How many a month, on the average, during that period?

A. I could not answer that; I am in and out there off and on all the time; it is impossible to answer.

149 X Q. You don't pretend to be able to state the substance of all these conversations, do you, even if the matter to which they related were brought to your attention?

A. No, sir.

150 X Q. A good many of these conversations have been about matters of considerable importance to his business or to yours, have they not?

A. Not great; he is a small buyer.

151 X Q. When was it that P. Joseph O'Keefe, of Worcester, Mass., gave you the first order for a hundred-dozen case of Merrick thread that he speaks of in answer 30 of his testimony?

(Answer 30 read to witness.)

A. In 1883, I think, that he partly gave me an order.

152 X Q. Are you sure that it was in 1883 that he gave you that first order referred to?

A. I am not positive as to the date.

153 X Q. What is your best recollection?

882 A. My best recollection would be 1883 or 1884; that is the nearest I can remember.

154 X Q. Can't you testify positively as to the year you got that order from O'Keefe?

A. I will be obliged to refer to the books if you want the exact date.

155 X Q. I want the year. Can't you give me that from memory?

A. I should say, after reflection from memory, it was 1884, and possibly it might have been 1883 or 1885; I cannot tell.

156 X Q. Why did the Merrick Thread Co. refuse to fill that order?

A. I don't remember any reasons given.

157 X Q. In obtaining that order from O'Keefe did you represent yourself to be an agent of the Merrick Thread Co.?

A. My conversation with O'Keefe was as agent for the Merrick Thread Co.

158 X Q. Mr. O'Keefe says substantially, "The Merrick Thread Co. refused to fill that order and claimed that Mr. Pierce was no longer their agent." Do you remember any circumstances of that kind connected with that order?

A. Nothing.

159 X Q. Don't you know that the Merrick Thread Co. did refuse to fill that order through you?

A. No, sir.

160 X Q. Do you claim that they did fill it through you?

A. No, sir.

161 X Q. Do you know through whom they did fill that order for Mr. O'Keefe?

A. No, sir.

162 X Q. Do you know that the order was filled?

A. I know that he received the thread.

163 X Q. Who was the agent of the Merrick Thread Co. in Worcester at that time?

A. I was, as far as I know.

164 X Q. Nobody else?

A. I saw no one else.

883 165 X Q. Did you know of any one else who was then their agent there?

A. I did not know any of their agents except Mr. Barr, in Boston.

166 X Q. You say Mr. O'Keefe gave you this first order for a hundred-dozen case of Merrick thread, and that you know of his getting that thread, and that the Merrick Co. did not fill the order through you; can't you explain why the order was not filled through you when it was given to you?

A. I don't know why the order was not filled through me, as it paid me my commission on the sale.

167 X Q. You have said above that it was not filled through you; I refer you to cross-question 160; what do you mean by that?

A. I have not so said it.

168 X Q. Mr. O'Keefe testifies that the Merrick Thread Co. refused to send that order which he gave you, claiming that you were no longer their agent, and that the Merrick Co. sent another agent of whom he bought a hundred-dozen case; is that testimony true?

A. I don't know as to those facts.

169 X Q. Didn't you ever hear of those facts before to-day?

A. Not that I remember.

170 X Q. Did not Mr. O'Keefe ever speak to you of that transaction and state those facts?

A. No, sir.

171 X Q. You are positive of that, are you?

A. I don't remember any of those facts as stated by Mr. O'Keefe to me.

172 X Q. Were you in habit of seeing Mr. O'Keefe frequently during the years 1884 and 1885?

A. Not very often.

173 X Q. Were you selling him goods at various times during those years or trying to?

A. I think I was.

174 X Q. How many conversations do you suppose you had with Mr. O'Keefe in 1884 and 1885?

884 A. It is impossible to say.

175 X Q. Did you see him as often as once a month during those years?

A. I should think so.

176 X Q. Do you remember having several conversations with him in regard to Merrick thread before he gave you that first order for a hundred-dozen case?

A. I don't remember whether there was more than one or not.

177 X Q. Mr. O'Keefe says you tried several times to sell him a hundred-dozen lot; have you any reason to doubt the truth of that statement?

A. I have no reason for doubting it.

178 X Q. What threads was Mr. O'Keefe selling at that time?

A. I don't remember.

179 X Q. In those conversations when you were introducing the Merrick thread to his notice was that Merrick thread compared with Coats'; I mean were they talked about in comparison with each other?

A. I never tried to introduce or show or explain either the Merrick's, Coats', Clark's, or any other thread to Mr. O'Keefe, as he already had the Merrick thread in his store at that time.

180 X Q. Did you not explain to him that he would be making an extra ten per cent. by buying Merrick thread from you?

A. I explained to him the Merrick thread was sold at a larger discount from the list than other threads of the same quality.

181 X Q. You explained to him that he could get a larger discount on Merrick thread than he could on Coats' or Clark's, for example?

A. As I understood it.

182 X Q. Did you offer him the inducement of a cabinet or wrappers or advertising cards if he bought Merrick's thread?

A. That was the inducement, together with the extra discount.

885 183 X Q. Did you recommend the Merrick thread to him as being as good as Coats' thread or Clark's thread?

A. I told him, as I did to all, that, in my opinion, the Merrick's six-cord spool cotton was as good as any six-cord spool cotton sold.

184 X Q. Did you tell him that he could sell it to customers as readily as he could Coats' or Clark's?

A. I don't remember of telling him that, as he had the thread already on hand and knew himself, and he bought the thread from his own knowledge of the goodness of the thread, together with the wrappers and cards, without charge.

185 X Q. In a general way, in these conversations, you talked up the advantages to him of the Merrick thread; is that not so?

A. Not in his case, as there was no need of it.

186 X Q. Well, what did you say about it then?

A. Simply urged him for an order for duplicates of the Merrick thread.

187 X Q. Do you remember whether you showed him any of the wrappers and advertising cards?

A. To the best of my memory he showed them to me in place of my showing them to him.

188 X Q. Did he have Merrick's spools and labels in his store at the time of these interviews we are referring to?

A. He did.

189 X Q. Did you see them there?

A. I did.

190 X Q. Can you state from whom he bought that Merrick thread he then had on hand?

A. He bought it of C. A. Potter.

191 X Q. Did Mr. O'Keefe also have Coats' thread on hand at the time of these interviews when you were soliciting his order for the Merrick thread?

A. I never saw any there.

192 X Q. How long have you been familiar with the Coats spools and labels?

A. About 25 years, more or less.

193 X Q. Did you ever see any spools except the Coats
886 and Merrick spools that had the numbers indicating the size of thread embossed on the spool heads?

A. I never looked to see.

194 X Q. Have you ever noticed whether the Coats spools had the numbers embossed on the spool heads?

(Objected to as leading.)

A. I have.

195 X Q. Have the Coats spools those numbers so embossed?

(Same objection.)

A. They have.

196 X Q. How about the Merrick spools?

A. In what respect?

197 X Q. In the same respect.

A. They also have numbers, if that is what you called embossed; they are what I call stamped numbers on the head of the spool.

198 X Q. Is not three-cord thread better for certain purposes than six-cord?

A. I never heard of it being any better at the same price.

199 X Q. Is not thread in numbers above 100 used for special purposes, if you know?

A. Certainly; for fine work.

200 X Q. Do you know how many cords Clark's O. N. T., Clark's Mile-end, and Willimantic are in numbers above 100?

A. I do not from my own knowledge.

201 X Q. What is and has been your understanding on the subject?

A. My belief, based on the retail trade through the country, is that Clark's O. N. T., Mile-end, Willimantic, and Coats' thread are six-cord thread from the lowest number to the highest; are so understood by the retail-trade consumers.

202 X Q. In the trade of selling spool cotton, are you in the habit of reading the paper labels on the spool heads?

887 A. I am not in the habit of reading them at all. The consumers all read the name in buying it. They always call for a certain make of thread; usually take the spool and read the name on the label on the head of the spool to see if they get what they ask for.

203 X Q. When a consumer buys a dozen spools does he or she usually, in your experience, read the whole dozen paper labels on the spools?

A. With hardly an exception they always read the labels on every spool to make sure there is no mistake.

204 X Q. How about purchasers of two dozen spools—how would they determine just what they were buying?

A. If it is a retail purchaser of an assortment of numbers that are purchased and are taken from the boxes the retail consumer in almost every case, with hardly an exception, looks at the label on each spool. If it is in solid dozens, either retail or wholesale, there is no occasion for looking, except at the label on the outside of the box.

205 X Q. If you noticed that on all the Coats spools of the numbers between 8 and 100, inclusive, the paper labels had upon them the word six-cord, while in the numbers above 100 the words six-cord did not appear on the labels, what would that lead you to think as to the number of cords in the thread of the numbers above and below 100 respectively?

A. I have always supposed that Coats' thread and all other first-class six-cord thread in all the numbers, from the lowest to the highest, was six-cord right through, and it is my opinion that there is not a lady or gentleman in the United States outside of the Coats' own people and operatives and a few experts but think the same.

(Answer objected to as entirely irresponsive.)

888 206 X Q. Question repeated.

A. There is my answer. The first answered your question.

207 X Q. I understood you to say that you had not noticed a difference in the labels on the Coats thread in numbers above and below 100. Now I call your attention to the fact that on the Coats numbers up to and including 100 the words "six-cord" appear, while in the numbers above 100 the words "six-cord" do not appear. What does this difference in the wording of the labels indicate to you as to the number of cords of the respective numbers?

A. It doesn't indicate how many cords there are above 100, if it is carefully read, but it takes close figuring to notice that "six-cord" is left out.

208 X Q. If a number of instances were testified to where retail buyers had made the mistake of taking Merrick's spools for Coats' when they wanted Coats', is there such difference between the spools that in your judgment, such a mistake would be impossible?

A. It would be impossible if the salesman looked at the spool when he took it from the box. The only way that it could happen would be if the salesman might be looking one way with his eyes and feeling the other way with his hand, which would be just as liable to happen with any other thread besides Coats'. It would not happen if he was looking at what he was doing, as the Merrick thread is written in plain black letters on a gold ground, whereas the Coats looks entirely different.

209 X Q. When were you first asked to come here and testify for the Merrick Co.?

A. I should say it was last year some time. I cannot place it. I was asked by Mr. Barr, their Boston agent, if I would come and testify. It was in my office in Boston.

210 X Q. Did he show you Bowker's testimony at that time?

A. He showed me nothing.

889 211 X Q. Did he tell you what it was?

A. He told me in part.

212 X Q. Was Mr. O'Keefe mentioned at that interview?

A. No, sir.

213 X Q. When did you first know that you were to contradict O'Keefe's testimony?

A. On Wednesday—day before yesterday.

214 X Q. Who told you that?

A. Mr. Hopkins or Mr. Barr, one or the other.

215 X Q. Where was that?

A. In my office, in Boston.

216 X Q. Then, from the time you had these conversations with O'Keefe before getting his order for that 100 dozen cabinet up to last Wednesday, you had never had your attention called to what was said at those interviews, had you?

A. Not a word.

217 X Q. What means, if any, have you taken since last Wednesday to refresh your memory as to what was said at those interviews?

A. I haven't taken any means; Mr. Hopkins or Mr. Barr told me, in brief, what O'Keefe had said respecting me, which did not take them over a moment. What they said about it and all the rest has been told here at this examination—what Mr. O'Keefe testified to.

218 X Q. When Mr. Barr saw you in 1886 in regard to testifying about Bowker, nothing was said about O'Keefe, was there?

A. Not a word.

219 X Q. Mr. O'Keefe gave his testimony in this case on July 23, 1885; how long before that date, as near as you can state, was it that you got that first order from O'Keefe for the 100-dozen case of Merrick thread?

A. I cannot remember the date; from memory I should state it was in 1884—as near as I can remember; I should have to go to the books to get you the date.

890 220 X Q. After the conversation you had with Mr. Bowker where he told you what he had testified in this case, which conversation you have referred to in your testimony, was the subject of his testimony talked of again between you?

A. It was casually brought up.

221 X Q. When and how often?

A. Soon after the first conversation he brought it up, urging me to go to New York in the interest of the Coats Co., and that he would even go and see them and get me paid a big price if I would go.

222 X Q. How long is it since you had any conversation with him on the subject?

A. A year or more.

223 X Q. When Mr. Barr first saw you with regard to testifying for the Merrick Co., was anything said about that testimony of Bowker's in this case being against you or a reflection on you?

A. He made no remark as to that, in the form as you put it.

224 X Q. Didn't he intimate that you ought to come out and contradict Bowker so that you would appear right in the matter?

A. He said nothing of the kind.

225 X Q. Was anything of the kind said at that interview last Wednesday in regard to O'Keefe's testimony?

A. Nothing said to me by anybody otherwise than what they said; nothing was said on Wednesday that I ought to do so and so.

226 — Q. When was it said, if at all, and by whom that you ought to contradict that testimony of Bowker or O'Keefe?

A. No one has told me that I ought to come to New York and contradict either statement; they have simply told me what they testified to in part.

227 X Q. After learning from Bowker what he had testified to here you made no effort to have yourself called as a witness to give your side of the story, did you, until Mr. Barr came to you?

A. I made no effort.

891 228 X Q. And unless Mr. Barr or some one else had come to you you would have let that testimony of Bowker's stand uncontradicted in this case, would you not?

A. The case never would have gone to court until I had set myself before the court properly.

229 X Q. Mr. Bowker's testimony was given on December 22d, 1884. How long did you intend to wait before coming forward to contradict him?

A. Any time before the case was reached.

230 X Q. What did you know about when the case would be reached?

A. I knew of the Coats and Merrick case through Mr. Barr a long while ago, that Coats had sued the Merricks on some point, and was told by Mr. Barr that it would be a long case, and knowing such cases are always kept by lawyers as long as they could keep them I thought that I had plenty of time and was posted by Mr. Barr in respect to what Bowker testified in regard to me some time ago.

231 X Q. Do you claim to have an especially good memory?

A. Especially good? An average.

232 X Q. Your business consists almost entirely of selling goods by sample and talking up the merit of new goods to customers, as I understand it?

A. Yes, sir.

233 X Q. And in the course of every month you have a great many conversations with customers about the goods you are selling?

A. Yes, sir.

234 X Q. And you would not pretend to give the exact words of the conversation you held with a customer three or four years ago and which at the time appeared of no particular importance, would you?

A. Not unless it affected my honor or honesty.

And, being further examined by Mr. WITTER, the witness says:

892 235 R. D. Q. Upon what do you base your evidence as to the quality of the Merrick thread being equal to any other, and that there is no real difference in quality between the thread of the principal makers, Willimantic, the two Clarks, Coats, and Merricks, whom you have mentioned?

A. My answer is based upon what the retailers, as a rule, say about the thread, but not by any actual use of the thread.

236 R. D. Q. Assuming that the sale and consumption of Coats' thread exceeds that of any other thread in this country, to what would you attribute the fact?

A. On account of its being in market so much longer than other threads.

237 R. D. Q. You say in answer to 197 X Q. that the Merrick Co. has the number "stamped" on the spool. Do other people use the word "stamped" in connection with the number as you have used it?

A. Yes; so I understand it.

WILLIAM G. PIERCE.

Adjourned to new motion.

NEW YORK, *Sept.* 20, 1887—2 p. m.

Met pursuant to notice.

Present: S. R. Betts, counsel for complainants, and W. C. Witter, counsel for defendants.

JAMES B. WHITMORE, a witness of lawful age, produced on behalf of defendants, being by me first duly cautioned and sworn to speak the truth, the whole truth, and nothing but the truth in the matter in controversy herein, and being examined by W. C. WITTER, Esq., counsel for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. James B. Whitmore; 44; Holyoke, Mass.; I am a dry-goods merchant.

893 2 Q. Do you hold any position of trust in Holyoke?

A. Treasurer of the Second Baptist church.

3 Q. State whether you are a man of property.

A. I am.

4 Q. And own real estate in Holyoke?

A. Yes; and elsewhere.

5 Q. State whether it is a part of your business to sell six-cord spool thread of 200-yard lengths.

A. It is.

6 Q. What threads of that description are you now selling?

A. Coats' and Merrick's.

7 Q. And what others have you sold?

A. Clark's O. N. T., Clark's Mile-end, Willimantic.

8 Q. How have you sold these threads, Merrick's, Coats', Willimantic, Clark's O. N. T., and Clark's Mile-end, at wholesale or at retail, or at both?

A. Both.

9 Q. For how many years have you sold the Coats' and the Merrick's at retail?

A. Coats' for 20 years, with some brief interruptions; Merrick's for 2 years; possibly more.

10 Q. How does the amount of such thread sold by you compare with the amount sold in the average dry-goods store in places of such size as Holyoke?

A. The same. I don't know as it's very much larger; it probably isn't any smaller.

11 Q. State whether it has been your practice to yourself personally sell to the consumer these threads over the counter.

A. It has.

12 Q. What numbers of Coats' 200-yds. thread have you been thus in the habit of selling?

A. 8 to 200.

13 Q. State whether these numbers of Coats' thread, 8 to 200, are advertised as six-cord.

A. They are.

894 14 Q. State whether your customers understand them to be of six-cord.

(Objected to as incompetent.)

A. I think they do.

15 Q. Have you ever noticed any difference in the lettering upon the labels of these numbers from 8 to 200?

A. I have.

16 Q. When first?

A. Recently.

17 Q. On your attention being called to it?

A. Yes, sir.

18 Q. Have you ever noticed the numeral upon the wood of these Coats spools?

A. I have.

19 Q. Does the numeral appear upon the wood of all the numbers from 8 to 200 so far as you have observed?

A. So far as I have observed, it does.

20 Q. What percentage of this Coats thread in numbers above

100 do you sell habitually? I mean what percentage of the whole amount is of numbers higher than 100.

A. I should say three per cent.

21 Q. What purpose is subserved by the numbers appearing in the wood of the spool?

A. The number indicates the size of the thread.

22 Q. What special purpose is subserved by having the number in the wood in addition to its appearance on the label?

A. The size of the thread can be determined by it in case of the label's being lost or defaced.

23 Q. Is it a fact that the label, both of these Coats' and Merrick's spools, do get lost and become defaced?

A. It is.

24 Q. What purpose is subserved by having the number upon the wood of the spool in several places?

A. The number can be seen without turning the spool.

895 25 Q. Which is depended upon or observed to determine the size of the thread in cases where the label is present and in good order?

A. The label.

26 Q. Did you ever know or hear of the numbers upon the wood of the spool being used for any other purpose than for the purposes you have stated?

A. I never did.

27 Q. Did you ever know this Coats thread to be inquired for or recognized in any sense by means of the number in the wood?

A. I never have.

28 Q. How, according to your experience and in your business, have the spools of this Coats thread been recognized?

A. By the label and the shape of the spool.

29 Q. How recognized by the label?

A. By the name.

30 Q. Have you ever known or heard of the spools of this Coats spool thread to be recognized in any other way than by the name upon the label?

(Objected to as incompetent.)

A. I have not.

31 Q. Have you been aware, generally, of the use by the Coats people upon the boxes containing their thread of a certain device or picture distinguishing their boxes of thread?

A. I have.

32 Q. Describe it briefly.

A. A cut representing a lion, an eagle, and other devices between these which I do not remember.

33 Q. And this device is accompanied with the word "trade-mark" in connection with it, is it not?

(Objected to as leading and as immaterial.)

A. It is.

896 34 Q. And this trade-mark is employed upon all the boxes containing the number- from 8 to 200, is it not?

(Same objection.)

A. I think so.

35 Q. Have you been accustomed to recognize Coats' boxes of so-called six-cord thread by that device?

(Same objection.)

A. I have.

36 Q. How long have you been familiar with the use upon best—that is, six-cord 200-yd.—thread of a black and gold label arranged in concentric rings?

A. About 20 years.

37 Q. And what has been the shape of these black and gold labels?

A. Round.

38 Q. And what has it been the practice to place upon these round black and gold labels?

A. The name of the maker, the number of the thread, the length of the thread, and the number of cords in the thread.

39 Q. Please mention the various threads that you have been familiar with of the best quality which have been thus marked by means of a circular black and gold label of concentric rings with the name, number, length, and quality upon the label.

A. Coats', Merrick's. I am not positive as to the others, whether they have all of these points designated on the black and gold label or not.

40 Q. What that have the name and number?

A. George A. Clark's, John Clark's, Willimantic, Kerr's, Coats', Merrick's.

41 Q. Will you please look at the various threads that you have mentioned, contained in Defendants' Exhibit No. 48, and state whether you are not mistaken in thinking that the Merrick has the length of the thread upon the black and gold label?

A. I am.

897 42 Q. That is the only one of these threads that has not the length upon the black and gold label, is it not?

(Objected to as leading.)

A. It is, so far as I notice.

43 Q. How is the Merrick thread distinguished from the Coats thread and other threads by yourself and by retail purchasers?

A. By the name on the label.

44 Q. Is that true of the other threads?

A. I think it is.

45 Q. To what extent is it true of the two Clarks that they are distinguished by the name?

A. The first part of each name is different, and they have different labels on the opposite end of the spools.

46 Q. These two makers both being named Clark, state what other means of distinguishing these two threads are accessible.

A. The color of the spool and the label mentioned in the last answer.

47 Q. The labels that you refer to bear upon them, do they not, the trade name as "O. N. T." and "Mile-end"?

(Objected to as leading.)

A. They do.

48 Q. And is it your experience that these trade-marks are sometimes used to designate these two threads?

(Same objection.)

A. It is.

49 Q. State whether, in your opinion, the name of the thread appearing upon the black and gold label is an adequate and sufficient means of designating these threads that you have named, with the exception, perhaps, of the two Clarks.

(Objected to as immaterial.)

A. I think it is.

898 50 Q. Did you ever deal in a thread known as the Orrs & Macnaught thread?

A. I never have.

51 Q. Did you see it and know of its being on the market some years since?

A. I did.

52 Q. Please narrate some of the details of how retail customers buy this spool thread.

A. They usually call for a spool of our best thread. If they have a preference for any kind they call for it by the name usually.

53 Q. What do you mean by "usually"?

A. John Clark's thread is sometimes designated as the thread on black spools by customers without giving the name.

54 Q. Did you ever know of a customer who wanted Coats' thread to make the mistake of accepting Merrick's in the place of Coats', supposing that they had received Coats'?

A. I never have.

55 Q. What have you known to happen?

A. When customers have called for a spool of our best thread without designating the make I have sometimes handed them a spool of Merrick's or Coats', and after looking at it they have stated that they preferred the other kind.

56 Q. Do you mean that handing them a spool of Merrick's they have stated that they preferred Coats' and *vice versa?*

A. I do.

56*a* Q. How frequently have you known this to happen?

A. Quite often.

57 Q. What should you say of a person who, desiring a spool of Coats' thread, should be handed one of Merrick's and go away supposing his desire had been met?

(Objected to as immaterial.)

A. I should say they had been deceived.

58 Q. By whom?

899 A. By whoever sold them the thread.

59 Q. What should you say as to whether the customer looked at the spool or not?

(Objected to as immaterial.)

A. I should say that the fact that they went away supposing they had one, when they had another, was in itself evidence that they did not look at the spool.

60 Q. What should you say of the seller?

(Same objection.)

A. That the seller was dishonest.

61 Q. What does best six-cord mean, as you understand it?

A. A thread composed of six strands.

62 Q. Does that make the best thread?

A. Yes.

63 Q. State whether, in your opinion, that is true of all the numbers of this thread from 8 to 200.

A. It is.

64 Q. What is the most desirable quality in the highest numbers of thread?

A. Strength.

65 Q. What is the most prominent thing appearing upon the black and gold labels of this thread of the different makers and taking all the sizes together?

A. The name of the makers.

66 Q. What next?

A. The number of the thread.

67 Q. How do you know that six-cord thread is the best?

A. By testing it, by the fact that it is advertised by the makers as six-cord, and that my customers call for it as the best.

68 Q. Does it bring the highest price also?

A. It does.

900 69 Q. When you sell thread that is known to be three-cord thread how does the price compare with the six-cord price?

A. The price of three-cord is about one-half the price of six-cord.

70 Q. Did you ever know of a 200-yard six-cord spool thread that did not have the maker's name prominently on the label and, except in the case of John Clark, upon a black and gold label?

A. None that I remember.

71 Q. Did you ever know of a 200-yard six-cord spool thread that was not known in the market and to consumers by the name of the maker except, to some extent, as you have explained, the thread of the two Clarks?

A. I never have.

72 Q. What sort of a number should you say the number on the wood of Coats' and the Merrick's spools to be, having reference to the way in which it was produced?

A. I should say it was stamped.

73 Q. State whether you recognize in Defendants' Exhibit No. 48 specimens of the various threads that you have spoken of in your testimony.

A. I do.

74 Q. State whether you buy the Merrick thread at a somewhat less price than you have bought those of the Willimantic, Coats, and the two Clarks.

A. I do.

75 Q. How does it happen?

A. I suppose because the Merrick Thread Company is not in the combination, so called.

76 Q. Combination for what?

(Objected to as immaterial.)

A. For the purpose of getting a high price for the thread made by the companies in the combination.

77 Q. What companies form this combination, as you understand it?

(Objected to as immaterial.)

901 A. J. & P. Coats, Willimantic, and Clarks.

Adjourned till 10.30 a. m. on Tuesday, Sept. 27, 1887.

Examination further adjourned to 10 a. m. Thusday, Sept. 29th, 1887.

NEW YORK, *Oct.* 12, 1887—10.30 a. m.

Met pursuant to adjournment.

Present: W. C. Witter, Esq., for defendant-; Sam'l R. Betts, Esq., for complainants.

JAMES B. WHITMORE, being further examined, deposes and says:

78 Q. Did you ever know of any other trade-mark used by J. & P. Coats or claimed as theirs except the one with the lion and eagle upon it, that you have described, and except so far as the name J. & P. Coats is a trade-mark?

A. I never have.

79 Q. State whether it is, and for how many years it has been, a usage of the trade to mark the 200-yard spools of six-cord thread by a circular black and gold label with the name of the maker and the number and quality.

(Objected to as leading.)

A. It is and always has been, so far as I know.

80 Q. What is the single precaution that will enable a customer to always distinguish the Merrick from the Coats?

(Objected to as leading.)

A. The use of the name of the maker.

81 Q. What to distinguish Coats' from Clark's?

A. In the case of George A. Clark, the name.

82 Q. What to distinguish Coats' from Orrs & Macnaught's?

A. The same.

902 83 Q. And for how many years has that been the means of distinction between the makers of 200-yards six-cord thread relied upon by the trade and the public?

(Objected to as leading.)

A. Always, so far as I have known.

84 Q. State whether, in your opinion, the words J. & P. Coats on said label give all the information required to clearly indicate the origin of the goods.

(Objected to as incompetent.)

A. They do.

85 Q. State whether the same is true of the words Merrick Thread Co. on their spools.

A. It is.

(Same objection.)

86 Q. In answer to your questions 15, 16, and 17 you say that you never noticed until recently any difference in the lettering upon the black and gold labels of the numbers of Coats' 200-yard six-cord thread from numbers 8 to 200. How recently was it you first noticed any difference?

A. At the time of my last examination when my attention was called to it.

87 Q. What causes can you mention as producing a defacement or a loss of the number on the margin of black and gold labels on the spool thread we have been talking about?

(Objected to as immaterial.)

A. Placing the thread on the spindles, friction in handling before being sold and in the hands of users.

88 Q. Do you know of any practice of keeping thread that is for sale on spindles?

A. I keep it so myself frequently.

89 Q. State whether the entire labels are punched off by the spindle, and, if yea, how often.

(Objected to as immaterial.)

903 A. They are frequently.

90 Q. Which end up are the spools generally put on the spindles?

(Same objection.)

A. Label showing the name of the maker is placed uppermost.

91 Q. Why?

A. To distinguish readily the name of the thread and the number.

(Same objection.)

And being cross-examined by SAM'L R. BETTS, he says:

92 X Q. How long has Merrick's thread been on the market?
A. I don't know.
93 X Q. How long do you know it has been on the market?
A. I have sold it for two or three years; perhaps longer.
94 X Q. Do you sell Merrick's thread cheaper than Coats' thread?
A. The same at retail, cheaper at wholesale.
95 X Q. You buy it cheaper than Coats' thread, do you not?
A. I do.
96 X Q. Has Coats' thread given satisfaction to your customers and to yourself since you have sold it?
A. Not always.
97 X Q. Has Merrick's always given satisfaction?
A. Has not.
98 X Q. How did you happen to begin to sell Merrick's thread?
A. The threads I was selling did not give universal satisfaction.
99 X Q. What is the average amount of spool cotton you sell in a year?
A. It varies from 700 dozen to 6,000 dozen, including all spool thread that I sell.
904 100 X Q. What amount of spool cotton did you sell at retail within a year past?
A. I should say six to seven hundred dozen.
101 X Q. How much was Merrick's thread?
A. Probably one-half or more.
102 X Q. Do you know whether Clark's thread or Willimantic is six-cord in number- over 100?
A. I couldn't state positively.
103 X Q. Do you state positively that Coats' thread in numbers over 100 is advertised as six-cord?
A. I think it is on the boxes.
104 X Q. Are you perfectly sure of this?
A. I couldn't say positively.
105 X Q. In numbers over 100 of Coats' thread does the word six-cord appear upon the spool labels?
A. I could not say.
106 X Q. Do you mean you don't know whether it does or does not?
A. I am not certain.
107 X Q. What is the difference in the lettering upon the labels of Coats' thread that you speak of noticing in answers 15 and 16?
A. I remember, now that my attention is called to it, that the finest numbers have not the words six-cord on the black and gold label.
108 X Q. By finest numbers do you mean those above 100?
A. I couldn't state at just what number of thread the change was made.
109 X Q. Have Clark's spools or the Willimantic spools any numeral embossed upon the wood?
A. Not that I remember.

110 X Q. Have the Merrick spools the number so embossed?

A. I think they have.

111 X Q. Do you know of any spools except the Coats and Merrick that have the numbers so embossed?

A. I don't now recall any.

112 X Q. Do not the labels of Clark's and the Willimantic spools get lost and become defaced?

905 A. They do.

113 X Q. In such case how is the size of the thread on those spools determined?

A. Approximately by the size of the spool.

114 X Q. In your opinion would it be an advantage to the Clark's and the Willimantic spools to have numbers showing the size of the thread embossed on the wood of the spools?

A. It would be an advantage in showing definitely the number of the thread.

115 X Q. Was Coats' thread the first spool thread you dealt in?

A. I don't remember.

116 X Q. Did you deal in it about the first?

A. We kept Coats' and Clark's for a good many years.

117 X Q. From the beginning of your business?

A. I don't remember which we had first.

118 X Q. On whose thread was the earliest black and gold label, round in shape, and with printing on it, that you remember seeing?

A. I couldn't say.

119 X Q. Was it either Coats' or Clark's?

A. I think so.

120 X Q. It was not Merrick's, was it?

A. It was not.

121 X Q. Are not the thread and spools of John Clark, Jr., recognized by the appearance of the spool—namely, its black color?

A. To some extent.

122 X Q. How do you distinguish Willimantic thread from Clark's except by the name?

A. I don't think now of any other way of distinguishing it, but I don't keep Willimantic's or Clark's at present.

123 X Q. Did you ever try to sell a spool of Merrick's thread for Coats's thread?

A. I never did.

124 X Q. Then you don't know whether it would be possible to do this with an ignorant customer, do you?

906 A. I don't know.

125 X Q. How do you know that the thread composed of six strands makes the best thread in all numbers?

A. From the fact that the more strands there are in any thread the stronger it is, the size being the same.

126 X Q. May not three-cord thread in higher numbers be better for certain uses?

A. I think not.

127 X Q. Do you know that the Merrick thread in numbers above 100 is six-cord?

A. I do.

128 X Q. Do you know whether or not that is the only concern that makes six-cord thread in numbers above 100?

A. I do not know.

129 X Q. In your experience has not Clark's and Coats' thread in numbers above 100 given as good satisfaction to yourself and customers as Merrick's thread in the same numbers?

A. Not in all cases.

130 X Q. Have they not given as good satisfaction, as a rule?

A. I think not recently.

131 X Q. How does the price at which you sell Merrick's in numbers above 100 at present compare with the prices at which you sell Coats' of the same numbers?

A. The prices are the same.

132 X Q. Don't you sell Merrick's in those numbers at retail at a lower price than Coats'?

A. I do not.

JAMES B. WHITMORE.

Subscribed and sworn to before me this 12th day of October, 1887.

[SEAL.] W. H. KENYON,
Notary Public, N. Y. County.

Examination adjourned to October 13, at 11.30 a. m.

907 NEW YORK, *Sept. 30th*, 1887—2 p. m.

Met pursuant to adjournment.

Present: W. C. Witter, Esq., for defendants; Sam'l R. Betts, Esq., for complainants.

DANIEL H. DOWNS, a witness of lawful age, produced on the part of the defendants, being by me first cautioned and sworn to speak the truth, the whole truth, and nothing but the truth in the matter in controversy herein, and being examined by W. C. WITTER, Esq., of counsel for defendants, deposes and says:

1 Q. What is your name, age, residence, and occupation?

A. Daniel H. Downs; I am 43 years of age; reside in Brooklyn, and am a manufacturer of shirts in New York city and have been in that business for 14 years or more.

2 Q. To what extent?

A. My firm manufactures from 125,000 to 150,000 dozens a year. The firm name is Downs & Finch.

3 Q. What thread do you use in the manufacture of these shirts?

A. For the over thread of our best work we use mostly Merrick six-cord; for the under thread we use other cheaper cottons, mostly two or three cord, made by various manufacturers.

4 Q. Which is the best thread, six-cord or three-cord?

A. Six-cord is much better.

5 Q. Why?

A. It is stronger, smoother, and more elastic for the same size.

6 Q. Is that true of all numbers of 8 to 200?

A. Other things being equal, it is universally true.

7 Q. What do you mean by other things being equal?

A. I mean the same grade of cotton and with the same care of manufacture.

908 8 Q. Does six-cord bring higher price; if so, how much?

A. Six-cord is worth two or three times as much as three-cord. Two-cord is still cheaper.

9 Q. What other six-cord thread have you used or become acquainted with?

A. We have used the Willimantic six-cord in large quantities, and I am acquainted with Orrs & Macnaught's, John Clark's, George Clark's, and Coats' to a greater or less extent.

10 Q. As far as you know what kind of a label has been the universal practice to place upon the best thread?

A. Black and gold label.

11 Q. Of what shape?

A. Circular.

12 Q. Bearing what upon it?

A. The name, number, and six-cord, and I think the length.

13 Q. For how long have you been familiar with this fact?

A. Twenty years.

14 Q. How are these threads distinguished in the trade and use?

A. By the name.

15 Q. How are they asked for by the purchaser?

A. So far as I know, by the name.

16 Q. State what difference in quality there is between the different threads of six-cord.

A. I think the standard makes of six-cord are about the same quality.

17 Q. Of how many cords is the best quality?

A. Six-cord.

18 Q. When and how did you become acquainted with Orrs & Macnaught's thread?

A. Between the years 1861 and 1865. I dealt in it for a period of several years.

19 Q. State whether that thread bore upon it the black and gold label with the name of the thread, the number, and the quality—that is, six-cord—upon it.

909 A. It had a black and gold label with the name of the maker and the number and, I think, the words six-cord upon it.

20 Q. State whether the Orrs & Macnaught thread was a popular thread, what you thought of its quality, and whether you recognize the spools in Defendants' Exhibit No. 48 bearing that name upon the label as examples of that thread.

A. It was a popular thread. I considered it to be of excellent quality, and I recognize the exhibits as the same.

And being cross-examined by Mr. BETTS:

21 X Q. Where is your place of business?

A. 43 and 45 Leonard St., N. Y.

22 X Q. How long have you been located there?

A. A little over one year.

23 X Q. In what business were you before you became a manufacturer of shirts?

A. I was a dealer in tailors' trimmings and men's furnishing goods.

24 X Q. For how long and where?

A. For 5 or 6 years in the city of New York.

25 X Q. What business were you in prior to that?

A. None.

26 X Q. What business were you in between the years 1861 and 1865?

A. Part of that time I was a clerk and then a partner in the business last stated.

27 X Q. You say you have been a manufacturer of shirts for 14 years or more. State just how long you have been in that business.

A. The business was begun in 1871 by a firm in which I was a special partner; 2 or 3 years after that time I became interested in it as a general partner, since which time I have been constantly in it.

28 X Q. You have said that for 5 or 6 years before going into the business of manufacturing shirts, which you say was in 1871, you were a dealer in tailors' trimmings, &c., and prior to that you were in no business. How do you reconcile that with your
910 statement that you were dealing in Orrs & Macnaught's thread between 1861 and 1865?

A. I meant by no business that I was not engaged in any business on my own account. I was a clerk.

29 X Q. With whom?

A. With the firm of Terry & Sandford, who did business at 26 Church St. and afterward in Chambers St., No. 89, I think, and at corner of Reade & Church streets, various years.

30 X Q. Where were they located between 1861 and 1865?

A. At some of the places last stated.

31 X Q. Where were they in 1861, when you first went there?

A. At 26 Church St.

32 X Q. How old were you then?

A. I don't recollect distinctly.

33 X Q. Will you please figure it up and tell me?

A. I was about 19.

34 X Q. You have stated in your first answer that you were 43 years of age. Now, I want to know exactly how old you were when you entered the employ of Terry & Sandford in 1861.

A. I did not state in my direct examination that I was 43. I stated that I was about 43. (After figuring:) I am now between 44 and 45, and I have answered my age when I went into the employ of Terry & Sandford.

35 X Q. You have said you were about 19. Now, can't you give me your exact age when you went into the employ of Terry & Sandford?

A. I cannot, because I am not certain of the exact date when that firm began business.

36 X Q. Have you ever dealt in Orrs & Macnaught's thread since you left them?

A. I think so.

37 X Q. Do you know whether that thread is still in the market in this country?

A. I do not know. I have been informed that it is not.

38 X Q. How long since you saw a spool of it prior to
911 looking at the spools in Defendants' Exhibit No. 48?

A. I don't recollect.

39 X Q. Is it ten years?

A. I do not recollect.

40 X Q. Is it twenty years?

A. I do not now recall having seen it since the time when I dealt in it, but presume I have.

41 X Q. Were you shown those Orrs & Macnaught's spools in Defendants' Exhibit No. 48 before beginning to give your testimony to-day?

A. No, sir. I saw the contents of the whole case standing here.

42 X Q. And did you see those spools in it?

A. Yes.

43 X Q. Between the years 1861 and 1865 do you claim to have been an expert judge of the quality of thread?

A. No; but I guess I knew what was good cotton.

44 X Q. Do you buy Merrick's six-cord thread at a lower price than you can buy Coats' thread?

A. No, sir.

45 X Q. Don't you get any discount or time that makes Merrick's thread come cheaper to you than Coats' thread?

A. No; I buy it because I believe it to be more suitable for my kind of work than any other thread.

46 X Q. From whom do you buy?

A. From the Merrick Thread Company.

47 X Q. At what price?

A. Forty-two and a half cents a spool of 2,400 yards.

48 X Q. What numbers do you use?

A. No. 60, 70, 80, and 90.

49 X Q. Are those the same numbers that you use of the thread of other makers?

A. Yes; for the same class of work.

50 X Q. Do you use the numbers above 100 in any of these makes of thread?

A. I think I have used them, but am not using them at present.

912 51 X Q. You are not, then, specially familiar with the numbers above 100, are you?

A. I think I am familiar with them, but I do not use them in my own factories very largely.

52 X Q. You never made any tests of these different threads, namely, Coats', Clark's, Willimantic, &c., as compared with Mer-

rick's, did you, for the purpose of determining comparative strength, smoothness, and other qualities?

A. Yes.

53 X Q. What tests?

A. I made a comparison between Merrick's and the Willimantic 2 or 3 or 4 years ago and put large quantities of both makes in use in the same factory side by side for the purpose of determining which was the best in shirt-work.

54 X Q. You never compared Merrick's with Coats' in this way, did you?

A. No.

55 X Q. You have not been in the business of selling thread for many years, have you?

A. I have not.

57 X Q. Did you ever sell thread at retail?

A. Never.

58 X Q. Did you ever sell thread from samples as an agent or drummer?

A. Yes.

59 X Q. When was that?

A. During the period when I dealt in tailors' trimmings, first as a clerk with Terry & Sanford and afterwards when I was a principal in that business.

DANIEL H. DOWNS.

Subscribed and sworn to before me this 30th day of Sept., 1887.

W. H. KENYON,

[SEAL.] *Notary Public, N. Y. County.*

913 Examination adjourned to new notice, with understanding that witness Whitmore will be further examined on Tuesday, Oct. 12th, at 10.30 a. m.

NEW YORK, *Oct. 13th*, 1887—11.30 a. m.

Parties met pursuant to adjournment.

Present: Counsel as before.

WILLIAM WISEMAN, a witness of lawful age, produced on the part of defendants, being by me first duly cautioned and sworn to speak the truth, the whole truth, and nothing but the truth in the matter in controversy herein, and being examined by W. C. WITTER, Esq., of counsel for defendants, deposes and says:

1 Q. What is your name, age, residence, and occupation?

A. William Wiseman; 29 years of age; reside in Keokuk, Iowa. I am senior partner in the firm of William Wiseman & Co., Keokuk, Iowa, dry-goods merchants.

2 Q. How long have you been a merchant there on your own account?

A. Eight years the first of last September.

3 Q. State whether you are a man of property and mention briefly to what extent.

A. Yes, sir; I own two farms, one of which I let out; the other I superintend myself. I own real estate in the city of Keokuk, besides personal property.

4 Q. Do you hold any office of trust in your city?

A. I am treasurer of the Keokuk Business Men's Association. I am director of the Keokuk Fair Association and of the Keokuk Hotel Association.

5 Q. What was the name of your firm in 1883 and 1884?

A. William Wiseman & Co.

6 Q. What did you do in those years in connection with the firm?

914 A. I helped to sell the goods and did virtually all the buying.

7 Q. State whether it is a part of your business to buy and sell at retail 200-yard six-cord spool thread.

A. Yes, sir.

8 Q. For how many years have you done so?

A. Ever since 1872.

9 Q. Have you personally sold such thread at retail over the counter to customers and has it been your habit to do so?

A. Yes, sir.

10 Q. Mention the 200-yd. six-cord spool threads you have sold at retail to consumers over the counter during the period from 1872 to the present time.

A. John Clark Jr.'s, Clark's O. N. T., Merrick's, Willimantic's, Coats'.

11 Q. What spool thread or threads of 200 yds. six-cord are you selling at present?

A. John Clark Jr.'s and Merrick's.

12 Q. Of which do you sell the most?

A. John Clark's.

13 Q. How much the most?

A. Oh, ten times as much.

14 Q. What colored labels do thread-makers use for their 200-yd. six-cord spools on the top end?

A. They use gilt and black.

15 Q. What shape of label do they use?

A. Round label.

16 Q. What do they put upon it?

A. The name and the number—200 yds. and six-cord.

17 Q. What is the most conspicuous thing upon these labels?

A. The name and the number; the name is most conspicuous, I think.

18 Q. What is next most conspicuous?

A. To the name? The number.

915 19 Q. Mention the spool threads of 200 yds. six-cord that you have dealt in which are designated by black and gilt labels.

A. All of them; yes, all of them.

20 Q. Did you ever know of any 200-yds. six-cord thread that did not have a black and gold label on the top end?

A. No, sir.

21 Q. How are these threads that you have mentioned distinguished from each other in the market and by retail purchasers?

A. By their names; they call for them by the names; they ask for it by the name of the threads.

22 Q. I notice on the Merrick Thread Co.'s spools, outside of the black and gilt label, numbers stamped in the wood of the spool. What do these numbers mean?

A. Their meaning is that when the label is destroyed they are there to designate the number of the spool; that is virtually all, unless they are brought back sometimes and have been on the stem of a sewing machine and been destroyed that way.

23 Q. When you say the number of the spool do you mean the number of the thread on the spool?

(Objected to as leading.)

A. Yes; the number of the thread.

24 Q. Could the number or size of the thread be told unless the number was somewhere on the spool or label?

A. No, sir.

25 Q. State whether it is a fact in your business that labels do become defaced and destroyed by handling.

A. Yes, sir.

26 Q. Did you ever know of Coats' 200-yd. six-cord thread being distinguished or asked for by the stamped number in the wood?

A. No, sir; never; always by its name.

916 27 Q. Did you ever know or hear of these numbers upon the *the* wood of a spool being used for any other purpose than to determine the size of the thread?

A. Only for that purpose.

28 Q. Did you ever know or hear that this mode of numbering formed any part of a trade-mark?

A. No, sir.

29 Q. What trade-mark, if any, have you been familiar with as the trade-mark of J. & P. Coats?

(Objected to as immaterial.)

A. There is a lion, an eagle, and a shield, I think, on top of their boxes. I supposed it to be their trade-mark; it is the only thread that has anything of that kind on it.

30 Q. What is the use of having the number in the wood more than once—several times?

A. If you pick it up out of a cabinet you can see the number any way you pick it up; on any side that is up.

21 Q. Did you ever know of anybody's buying Merrick's thread by mistake when they wanted Coats'?

A. No, sir.

32 Q. State whether, in your opinion, retail purchasers, consumers, using such care as is ordinarily used by such people would be likely to take the Merrick thread by mistake when Coats' thread was what they desired.

(Objected to as incompetent, calling for a mere matter of opinion.)

A. No, sir.

33 Q. Do you think a person could unintentionally do so without being very heedless?

(Same objection.)

A. No, sir.

34 Q. What is there upon the Merrick spools which distinguishes them from all others?

A. Its name.

917 35 Q. How distinctly does its name appear, compared with the names upon the other makes of spool thread?

A. Just as much so, if not more plain.

36 Q. Does the name appear in any unusual place, or in the place where it always appears on this article of trade?

A. It appears where all the others are; in the same place.

37 Q. Christopher D. Beale, in a deposition given by him for complainants on July 2d, 1884, said as follows:

"12 Q. When was your attention first called particularly to the Merrick Thread Company's spool cotton?

A. I have known the Merrick spool cotton for a number of years. My attention was especially called to it on the 2d of February, 1884.

13 Q. Where was this?

A. Keokuk, Iowa.

14 Q. Please state what occurred at the time and place mentioned by you which called your attention specially to the matter.

A. I was in a retail dry-goods store talking with the proprietor upon the different merits of the spool cottons. He drew my attention to the label upon the end of the Merrick spool cotton, saying at the time it was a very easy matter to substitute for Coats' cotton. To prove what he had said in my presence he sold a lady four spools of cotton. She wanted Coats'. He put in one spool of Coats', three spools of Merrick. At that time the deception was not discovered. I asked him if he did not think it would be returned. He said no, as he had often done so before. The only object he had in substituting Merrick for Coats' at that time was to show me how easily the consumer could be deceived.

15 Q. Did you call this matter to the attention of your principals at that time?

A. About ten days after.

918 16 Q. Did you know at the time that there was any controversy between the Messrs. Coats and the Merrick Thread Co.?

A. I did not.

* * * * * * *

21 Q. Please state what your own experience has been in regard to the difficulty of distinguishing the said spools of the said two manufacturers.

A. The difficulty that I had was in the same place at Keokuk. Being a little near-sighted, it became difficult for me to distinguish

in the cabinet where they kept their cotton the difference between Coats' and Merrick, with the light they had in their store.

* * * * * * *

32 X Q. In your answer to Q. 21 you speak of some difficulty you had in distinguishing spools kept in a cabinet by reason of your near-sightedness. Who kept the cabinet?

A. William Wiseman & Co., Keokuk, Iowa.

33 X Q. Is Mr. Wiseman the "proprietor" you referred to in your answer to Q's 12 to 14, inclusive?

A. Yes."

Q. Did any such incident or occurrence take place as is narrated in answer to Q. 14 between you and Mr. Beale or anybody else?

A. No, sir.

38 Q. Did you ever say to Mr. Beale or anybody else that it was an easy matter to substitute Merrick's for Coats' thread?

A. No, sir.

39 Q. Did you ever sell to a lady who wanted Coats' cotton some spools that were partly Merrick?

A. No, sir.

40 Q. Did you ever say that you had often done such a thing?

919 A. No, sir.

41 Q. Did you ever take any means whatever to show Mr. Beale or anybody else how easily a customer could be deceived?

A. No, sir.

42 Q. What should you say of a person who should intentionally wrap up Merrick's thread for Coats' when the customer wanted Coats'?

(Objected to as immaterial.)

A. It would be a fraud.

43 Q. State whether, in your opinion, it is possible to do so, if the seller were disposed, whether the substituted threads were Merrick's or any other make.

A. Oh, they can do it, but they would bring it back. They can do anything. They could do up a package of buttons instead of the thread desired, if they tried, a card of buttons.

44 Q. Please look at the spool threads in Def'ts' Ex. No. 48 and state whether you recognize in said exhibit samples of the various threads you have mentioned in your deposition as they are sold in the market.

A. Yes; I do. I have also sold Clark's Sterling thread, of which I see an example in the box; also Clark's C. S. I.

45 Q. Of how many cords do you understand that the 200-yds. thread of J. & P. Coats consists in all the numbers from 8 to 200?

(Objected to as immaterial.)

A. Six cords.

And being cross-examined by S. R. BETTS, Esq.:

46 X Q. Who compose your firm of William Wiseman & Co.?
A. Louis Geiger, Charles Wiseman, and myself.
47 X Q. Who composed your firm on the 2d of Feb., 1884?
920 A. These same parties.
48 X Q. What relation is Charles Wiseman to you?
A. He is a cousin of mine.
49 X Q. How old a man is he? And describe his appearance.
A. He is 26 years old; medium small man, 5 ft. 4 high; blue eyes; light complexion; wears a moustache.
50 X Q. Was he in the habit of selling thread over the counter in your store in February, 1884, or about that time?
A. Yes, sir.
51 X Q. Was your other partner, Mr. Geiger, also in the habit of selling thread over the counter at that period?
A. He was.
52 X Q. Do you know Christopher D. Beale; and, if so, how long have you known him?
A. I do; have known him about 5 or 6 years.
53 X Q. State what was his business since you have known him.
A. Selling thread—Coats' thread for Coats' people. He is selling agent for Coats' agency in this city.
54 X Q. Did your firm buy Coats' thread from him?
A. No, sir.
55 X Q. Did you ever see Christopher D. Beale in your store?
A. Yes, sir.
56 X Q. How frequently was he in there?
A. Every six months, I should judge.
57 X Q. Was he in there in the year 1884?
A. I suppose he was.
58 X Q. And in February, 1884?
A. He may have been.
59 X Q. What did he come to your store for?
A. To sell Coats' thread or induce us to take hold of it.
60 X Q. Were you not selling Coats' thread in Feb., 1884?
A. We were some.
921 61 X Q. Were you not also selling Merrick's thread at that time?
A. Yes, sir.
62 X Q. How did you keep your spool thread in the store in Feb., 1884?
A. In cabinets.
63 X Q. What cabinets?
A. Merrick's.
64 X Q. Then you kept your Coats' thread in Merrick's cabinet, as I understand?
A. Yes, sir.
65 X Q. In what part of the store?
A. In the central part, left-hand side as you go in.
66 X Q. What store?

A. The store where we then were; we have been in our present store three years last September.

67 X Q. How was the store you occupied in Feb., 1884, lighted?

A. Front and back windows and by gas.

68 X Q. What was the depth and width?

A. The store where we kept our thread was 65 ft. deep, 22 ft. wide.

69 X Q. And the cabinet of thread stood about midway between the front and back?

A. Yes, sir.

70 X Q. And there was no light from above, but only from ends?

A. That is correct.

71 X Q. What size and style of windows did you have front and back?

A. We had three double doors, all windows, in front. There was three windows in the back.

72 X Q. How late in the day did you keep your store open?

A. Nine to half past nine, and Saturdays ten in the evening.

73 X Q. Was Christopher D. Beale acquainted with your two other partners?

A. He was with Charley. I don't know whether he was with Mr. Geiger. He don't do any buying.

922 74 X Q. When Mr. Beale came in to try and induce you to take hold of Coats' thread, did he talk with you about the different makes of thread?

A. At that time?

75 X Q. Yes.

A. He may have said something about different makes of thread. I couldn't be positive.

76 X Q. Then you will not say that he did not talk with you in Feb., 1884, upon the different merits of spool cotton, will you?

A. No; I couldn't say that he did not.

77 X Q. And you would not say that at this time, Feb., 1884, would you, that he did not talk with you about Merrick's spool cotton?

A. He undoubtedly said something about it, trying to induce — to take up this thread, as that it was better introduced and would sell easier.

78 X Q. I desire to call your attention to the fact that the interview which Mr. Beale mentions in his testimony and the occurrence which he relates in answer to question 14 took place, as he says, on Feb. 2, 1884; that he says in answer to question 15 that he called this matter to the attention of his principals, namely, Auchincloss Bros., about ten days after, and Mr. Beale himself gave his testimony in this case setting out this occurrence on July 2, 1884. In view of these facts will you now testify that the question of similarity of label upon the Merrick and Coats spools was not discussed by you and Mr. Beale in Feb., 1884?

A. I don't think it was. I don't remember discussing anything of that kind about the label. I never thought of it until this case came up.

79 X Q. You never thought of it from that time until you were asked to come on here to testify. Is that what you mean?

(Question objected to by defendants' counsel as misleading.)

A. Yes, sir; until just now, in fact—that is, until I got here. There was nothing said to me about labels until I got here.

923 80 X Q. Then your attention has not been called in any way to an interview with Mr. Beale at your store in Feb., 1884, or what happened then until you arrived here in New York yesterday to testify in this case?

A. No; I was notified to come here; I knew at that time; that was a few days before I came. I was requested by Mr. Still, of Chicago, agent for Merrick, to come to New York; there was a lawsuit there, and that my name was implicated, and a statement was made in regard to some remarks that I should have made when Mr. Beale was in our city some three years ago, which I knew were untrue.

81 X Q. Who first told you what those remarks were before you began your testimony?

A. Mr. Still.

82 X Q. When was that?

A. Just a few days ago.

83 X Q. Whereabouts?

A. Keokuk.

84 X Q. Did he come out there to see you?

A. Yes, sir.

85 X Q. How did he inform you what the statements were?

A. He read a clause that was there, something about selling some thread to a lady as Coats', wrapping up some thread as Coats, to show how easily a person can be deceived, which I knew was false; that's the reason I came, to right a wrong.

86 X Q. Did he offer to pay your expenses?

A. Yes, sir.

87 X Q. Did he offer to recompense you for your time in any way?

A. Yes; he said that he would pay my expenses and give me what was just and right, whatever my time was worth; we would settle it after I got to New York.

88 X Q. Can you testify that you never sold any spool cotton to a customer in your store while Mr. Christopher D. Beale was present?

A. I don't think I did.

924 89 X Q. Will you testify positively, and in view of his statement under oath, made within five months of the time of this occurrence, he states, that you did not sell spools of cotton to a customer in your store in February, 1884, and in his presence?

A. I can say that I never sold any spool cotton to a woman in his presence to show him how easily she could be deceived.

(Answer objected to as irresponsive.)

90 X Q. You have not answered my question; please hear it read again and answer it.

A. I may have sold some.

91 X Q. If you did as you say you may have can you now tell me whose make of spool cotton they were?

A. We carried Merrick's thread at that time.

92 X Q. You carried Coats' also at that time, did you not?

A. A little.

93 X Q. If you did make a sale to a customer of spool thread in the presence of Mr. Beale on Feb. 2, 1884, are you able to testify now from your recollection whose make of spool cotton you did sell?

A. No.

94 X Q. Do not customers sometimes purchase different makes of spool cotton at one time?

A. They sometimes may.

95 X Q. Then you have sold Coats' and Merrick's thread both at one time to a customer, have you not, in your experience?

A. Yes, sir—that is, I never did so without telling them then what I was giving them different from what they asked if we happened to be out of certain numbers.

96 X Q. Have you any books that show your sales of thread over the counter?

A. No, sir.

97 X Q. Nothing that would show whether on a certain day you had sold Coats' thread or Merrick's thread, or how much?

925 A. No, sir.

98 X Q. When did you first begin to sell Merrick thread?

A. Between four and five years ago.

99 X Q. When did you first sell Coats' thread?

A. Ever since we have been in the business.

100 X Q. Do you buy Merrick's thread cheaper than Coats'?

A. Yes.

101 X Q. Do you sell it at the same price?

A. Yes, sir.

102 X Q. Then you make a larger profit by selling Merrick's thread than Coats'?

A. Yes, sir.

103 X Q. Can you or not state whether Christopher D. Beale had an interview with Mr. Charles Wiseman at your store in February, 1884, in which the subject of similarity of labels of Merrick's and Coats' spool cotton was discussed?

A. Charles Wiseman says that he had not any such conversation.

(Answer objected to as hearsay.)

104 X Q. I ask you of your knowledge whether or not Mr. Beale had such an interview with Mr. Charles Wiseman.

A. Not to my knowledge.

105 X Q. Are you familiar with the Willimantic thread?

A. Yes, sir.

106 X Q. What kind of a label has that on the top end?

A. Gold and black.

107 X Q. What kind of a label has John Clark Jr.'s thread?

A. It has black, gold, and silver.

108 X Q. How are the threads of the two Clarks distinguished from each other? I mean George Clark's and John Clark Jr.'s.

A. One is called O. N. T. Clark and the other is called
926 John Clark Jr.'s thread. They are called by their names when they call for thread. John Clark's is on a black spool, and they call for a black spool sometimes.

109 X Q. Do not customers distinguish George Clark's from John Clark's by the appearance of the spools?

A. Some do sometimes; usually by the name.

110 X Q. Is not the appearance and color of the spool the most conspicious thing to a person looking at John Clark's spools unless he examines them closely?

A. Yes.

Adjourned for lunch.

111 X Q. Have you had any conversation during the adjournment with any one as to the testimony you have given in this case?

A. Yes. They merely asked me if we had our thread mixed in the cabinet. I told them yes, but we never sold any different from what people asked for and would allow none of our clerks to sell cotton of that kind and that I never sold any to deceive anybody. Yes; to that effect.

112 X Q. Was anything else said during the recess about your testimony?

A. No.

113 X Q. What amount of spool thread do you sell on an average yearly?

A. Fifteen hundred dozen.

114 X Q. Is this all retail?

A. Virtually all.

115 X Q. What proportion of this is Merrick's thread?

A. Just a trifle.

116 X Q. How was it in February, 1884?

A. Almost altogether Merrick's thread.

117 X Q. Why have you changed from Merrick's to John Clark's?

A. 'Cause we found we could buy it in quantities just as cheap.

927 118 X Q. And you consider it a better thread at the same price, do you?

A. No, sir; because it is better known.

119 X Q. Is not Coats' thread much better known than Merrick's?

A. Yes, sir.

120 X Q. Do you know of any spools except Coats' and Merrick's that have numbers stamped on the wood outside the label?

A. No, sir.

121 X Q. Would it not be an advantage for the Clarks and Willimantic spools to have the number of the threads stamped on the wood so as to show the numbers of the thread in case the label was destroyed, in your opinion?

A. I think it would; all spools ought to have it.

122 X Q. Are not those numbers stamped on the Coats spools, upon the wood thereof, of a mark of difference between those spools and the spools of other makers excepting Merrick's, who also use the numbers?

A. There isn't any that use the number excepting Merrick and Coats—that is, I know of none.

123 X Q. For how long have you noticed this difference of Coats' and Merrick's spools which have the numbers stamped on the wood and all the other spools which do not have it?

A. I cannot say how long back I took special notice.

124 X Q. Well, about how long?

A. I couldn't designate any time.

125 X Q. You have noticed this difference, however, have you not?

A. I always look for the name when I pick out the thread.

(Answer objected to as irresponsive.)

Question repeated.

A. I may have seen it, but did not notice it specially. I always look for the name.

126 X Q. What is a trade-mark?

(Objected to as incompetent and immaterial.)

928 A. Designates what you have on sale, what your property is supposed to be.

127 X Q. Have you not been familiar with the appearance of the Coats spools so as to recognize them without the name of J. & P. Coats thereon?

A. Sometimes tell by the number; situation a little different.

128 X Q. Do you ever remember ever having had any spool cotton to return to you because of there having been a mistake of some kind by which the consumer had received spools of a different manufacturer from that which was wanted?

A. No. They only have been returned when taken out by children or young people sometimes on approval, except when their mothers would want the thread they sent for.

129 X Q. How well acquainted are you with Christopher D. Beale?

A. I know him only as a salesman.

130 X Q. Where does he live?

A. I do not know.

131 X Q. Have you had any business dealings with him?

A. No; we have never bought goods from him. He came in to sell us his goods.

132 X Q. How lately has he been in your store?

A. I think it was last Saturday or Monday; it was one of those days, I am positive.

133 X Q. Have you had any conversation with him in regard to this occurrence which he has testified took place on Feb. 2, 1884, at your store?

A. No, sir.

134 X Q. Had you received word from Mr. Still, the Merrick agent, who got you to come on here in regard to this occurrence of Feb. 2, 1884, before you last saw Mr. Beale?

A. Yes, sir.

135 X Q. And you made no mention of the fact or that occurrence in any way to Mr. Beale. Is that so?

A. That's so.

929 136 X Q. When last, prior to last Saturday or Monday, was Mr. Beal in your store?

A. I think it was January of this year. He may have been in between that time, but I did not see him.

137 X Q. Can't you testify positively if it was last Saturday or last Monday that Mr. Beale was in your store?

A. I think it was Monday.

138 X Q. Are you positive of this?

A. I am positive that he was in Keokuk Monday.

139 X Q. Did you have any conversation with him?

A. Yes, sir.

140 X Q. What about?

A. Come in the store when we were very busy, threw down a little sample book, and asked me if we were ready for a change. I told him I thought not. He says, "When you are I would like to put in our cotton. Good-bye."

141 X Q. Do drummers for other concerns selling spool cotton visit you frequently?

A. Yes, sir.

142 X Q. About how often do you have a spool-cotton drummer in your place?

A. Say one every three months; about that; Clark's, Coats', Merrick's.

143 X Q. You would not be willing to testify as to all the conversations you have had with these various drummers for the last four years in your store or as to what was said by them or you in regard to comparison of their different threads, would you?

A. Substance of their language is generally speaking of their own thread, selling their own thread.

144 X Q. Suppose one of these drummers within ten days of having a conversation with you put the substance of that conversation into writing, and three years and a half has since elapsed without the matter ever being called to your attention, do you claim that your recollection of that conversation at the present time is more likely to be correct than the written report, made within ten days after such a conversation had occurred?

930 (Objected to as immaterial; also a- suggesting to the witness a state of facts nowhere proved in this case.)

A. I know it is; then the words. It is false, his words.

145 X Q. Do you mean to say, then, that your recollection of any conversation had with a person three years and a half ago in your

store is better than his statement of that conversation reported to his employers within ten days after it occurred?

(Same objection.)

A. I claim that I would remember such an instance as that.

146 X Q. Then you don't claim that your recollection of an ordinary conversation had in your store three years and a half ago would be better or more likely to be correct than a written report of it made by the other party within ten days of the conversation, do you?

(Same objection.)

A. It depends upon what happened at the time. If something unusual happens I remember such things, such conversations.

And being examined in redirect:

147 R. D. Q. Did your partner, Mr. Geiger, do any of the buying in 1884?

A. No, sir.

148 R. D. Q. Whom would Mr. Beale have been likely to have had his conversation with in February, 1884, if he was in your store then?

A. With myself.

149 R. D. Q. Why?

A. Because I done all the buying at the time.

150 R. D. Q. You say that Mr. Beale did not, to your knowledge, have an interview with your partner, Charles Wiseman, at your store in February, 1884, at which the subject of similarity of
931 labels of Merrick's and Coats' spool cotton was discussed. State what makes you think so.

A. I asked him just before I started. He said that to the best of his knowledge he never had any such conversation with Mr. Beale.

(Answer objected to as incompetent and hearsay, and motion made to strike out the same.)

151 R. D. Q. When and where was this conversation had by you with Charles Wiseman?

(Same objection.)

A. Just before I left New York for this trial.

152 R. D. Q. Was the same thing read over to Charles Wiseman that was read over to you by Mr. Still as to statements that Mr. Beale had made in this case about his conversation with you in February, 1884?

(Same objection and motion, and complainants' counsel protests against this illegal method of trying to introduce the testimony of Charles Wiseman through statements made by him to another person and without producing said Charles Wiseman for examination and cross-examination.)

A. We were all three standing in a group; he was listening, so he overheard it as well as myself.

153 R. D. Q. What was done by Mr. Still at that time, after he had read over Mr. Reale's statement to you and to Charles Wiseman?

(Same objection as above.)

A. He said that he would not like to take me away from *by* business, as he saw how busy we were, but if I would go he would pay all my expenses and would give me what was just and right for my trouble and time. We could settle in New York when I found out what my expenses would be.

932 154 R. D. Q. Did Charles Wiseman, after hearing at that interview what Mr. Beale had stated in this case about his February, 1884, conversation with you, make any statement about the truth of Mr. Beale's statements so far as he, Charles Wiseman, was concerned?

(Same objection, notice, and protest as above.)

A. He said that he had no knowledge or could remember of anything of that kind transpiring.

155 R. D. Q. Do you sell your John Clark's spool cotton for the same price at which you sell Coats' and Merrick's?

A. All the same price.

156 R. D. Q. How is it that you are able to buy John Clark's and Merrick's spool cotton at a lower figure than you can buy Coats' for?

A. We cannot buy Clark's any cheaper, but we can Merrick's.

157 R. D. Q. Explain how that is.

A. Merrick's thread, not being as well, must be sold a little cheaper as an inducement to buy.

158 R. D. Q. Is the cheapness a question of the quantity bought?

A. It is with the Clark's and Coats,' but not so with Merrick's.

159 R. D. Q. That is, Merrick's has one price for all quantities?

A. Yes; for small quantities. They may for large quantities, but we have not tried them. They give the same discounts for small quantities as Coats' and Clark's for large quantities.

160 R. D. Q. The discounts in the two cases being from the same original price?

A. Yes.

161 R. D. Q. So that when you testified on your cross-examination that you changed from Merrick's to John Clark's because you found you could buy it in quantities just as cheap, you meant that you found that you could get the same discounts if you bought larger quantities of John Clark's that you had got when buy-

933 ing smaller quantities of Merrick's, the original price of the two from which the discounts were figured being the same. Is that correct?

(Objected to as leading.)

A. Yes, sir.

162 R. D. Q. You now pay for Clark's cotton very nearly what you paid for your Merrick's cotton when you were buying the smaller quantities that you have testified about?

(Same objection.)

A. Just about the same.

163 R. D. Q. You have testified that in February, 1884, your Coats cotton was in a Merrick cabinet. Explain how that came to be the case.

A. We were keeping Merrick's thread at the time. When we got out of certain numbers and wanted them in a hurry we would send to our jobbing-house in our city and get what we wanted or needed of Coats' cotton, as they did not keep Merrick's. That is how it came that we had Coats' cotton in our Merrick's cabinet.

WM. WEISMANN.

Subscribed and sworn to before me this 13th day of October, 1887.

W. H. KENYON,

[SEAL.] *Notary Public, N. Y. Co.*

NEW YORK, *Oct. 28th*, 1887.

Met pursuant to notice.

Present: S. R. Betts, Esq., for complainants; W. C. Witter, Esq., for defendants.

LYMAN R. HOPKINS, being recalled in behalf of defendants, deposes and says as follows:

1 Q. Are you the Lyman R. Hopkins who testified previously in this case?

A. Yes, sir.

934 2 Q. Have you read the deposition of Frederick Smith taken by commission on the part of the complainants herein?

A. Yes, sir.

3 Q. Has your company or any agent or employee of it ever had any dealings whatsoever with Frederick Smith or with the firm with which he is or has been connected or with any member thereof?

A. No, sir.

4 Q. What means have you taken to ascertain whether any agent or employee of your company ever sold or offered for sale Merrick thread to said Smith or his firm or whether any such representations were ever made to said Smith by any agent or employee of your concern as are mentioned in Smith's deposition?

A. After I had read Smith's deposition, taken by commission, I instructed our Western agent, Mr. Still, to make a thorough investigation to find out if any drummer, salesman, or agent of our concern had ever solicited or offered to sell our thread in Burlington, Kansas, and he informed me that up to that time that no seller or agent from our concern has ever been in that place to sell spool cotton.

(All of said answer beginning with the words "he informed me" to its end objected to as incompetent and hearsay, and motion is made to strike out the same.)

5 Q. Over how large a territory does Mr. Still's agency for your thread extend?

(Objected to as immaterial.)

A. His agency and control extends over all the territory west of Cleveland and south to the State of Texas.

6 Q. Are all the drummers, salesmen, and agents of the Merrick thread in the territory mentioned under Mr. Still's control and direction?

(Same objection.)

935 A. Yes, sir.

7 Q. Did Mr. Still, in pursuance to your directions, make a thorough investigation to find out if any drummer, salesman, or agent of your concern had ever solicited or offered to sell Merrick thread in Burlington, Kansas?

(Same objection.)

A. He did.

8 Q. With what result?

(Objected to as incompetent.)

A. The result that I have just stated, that no agent or seller of our company had ever been in that place.

(Objected to as hearsay and motion made to strike out.)

9 Q. Please state whether extraordinary efforts were made in the cross-questions which were prepared for Frederick Smith to learn from him who the person was that he referred to as having tried to sell Merrick's thread to him in Burlington, Kansas.

(Objected to, as the cross-questions themselves form part of the evidence in this case and are the best evidence as to what is inquired about in the said questions.)

A. Yes, sir. I spent considerable time with our attorney to try and arrange those questions so as to find out, if possible, who the man was, if anybody, that made those representations to him.

10 Q. Then you personally assisted in preparing these cross-questions for the purpose mentioned, did you?

(Objected to as immaterial.)

A. Yes, sir.

11 Q. Were you enabled by the testimony of the said
936 Frederick Smith to get any clue whatever to the identity of the person referred to by Smith that was of any assistance to you in your efforts to find out who that person was?

A. No, sir; he gave no description that we could trace to find out anything about him—who he was.

12 Q. Is it your custom in the regular course of your business to give instructions to Mr. Still, as your agent, as to any matters pertaining to your thread business?

(Objected to as immaterial.)

A. Yes, sir; he is under our instructions in all matter pertaining to the business.

13 Q. And has it been and is it now a regular part of Mr. Still's business as your agent to report to you concerning all matters pertaining to the business and to the manner in which your instructions are carried out?

(Same objection.)

A. Yes, sir.

14 Q. Have you neglected any means whatever that you had for discovering who the said person was referred to by Mr. Smith in his deposition?

(Objected to as indefinite.)

A. I have used all the means that I could to find out who the man was, if anybody, and I could not trace him at all.

Cross-examination by Mr. BETTS:

15 X Q. Is not Merrick thread on sale in Burlington, Kansas?

A. To-day? Do you mean now? I suppose that you mean, is Merrick thread on sale in Burlington, Kansas, to-day? I am instructed by Mr. Still that the first sale of our thread in Burlington, Kansas, was made this present month—October, 1887.

937 15*a* X Q. Then will you testify that no Merrick thread in any quantity was ever sold or offered for sale in Burlington by anybody prior to this present month of October?

(Objected to as immaterial and irrelevant.)

A. No, sir; parties might have bought our thread from jobbers and might of have sold it in Burlington, Kansas. It is not an impossibility.

16 X Q. And this might have happened as far back as and at the period referred to by Frederick Smith in his deposition, might it not?

(Same objection.)

A. Yes, sir; it might have happened.

17 X Q. And the person so offering Merrick thread to Frederick Smith at that time may have represented himself as an agent for the Merrick Thread Company, for all you know?

(Same objection; also as improper and as contrary to the testimony already in this case.

Complainants' counsel refers to testimony of Frederick Smith in answer to above objection.

Defendants' counsel is aware of said testimony and renews his objection.)

A. If any person made such representations to Frederick Smith as agent or seller for the Merrick Thread Company, he told an untruth.

(Answer objected to as irresponsive.)

18 X Q. Please answer my question.

A. I don't know but what some man may have represented himself as agent for our company, but, if he did, he told that that was not true.

(All after the words that "if he did" objected to as irresponsive and motion made to strike out.)

938 19 X Q. Can you testify from your own knowledge that no agent of your company was in Burlington, Kansas, in the year 1886?

A. I can testify that I have used all means in my power to find out whether any of our agents were in Burlington, Kansas, within 6 months of the time referred to by Frederick Smith, and I cannot find out that they were.

20 X Q. Can you testify of your own knowledge that no one agent was in fact there during that time?

A. All that I can testify to is that I have used all the means in my power, and I cannot find out that any of our agents were there within six months of that time.

21 X Q. And for this information you rely on the statements made to you by other people, do you not?

A. I rely on the statements made from men themselves, the drummers.

22 X Q. What was the nearest to Burlington, Kansas, that any drummer for the Merrick's thread approached, to your knowledge, in 1886?

(Objected to as immaterial and irrelevant.)

A. I think we sold some in Kansas City in 1886. I don't personally know of any nearer than that.

23 X Q. You have said that you relied upon the statements of the drummers themselves. How were those communicated to you?

A. Partly by word of mouth and partly by letter.

24 X Q. Are all the drummers who were in your employ during 1886 still in your employ?

A. I think they are. I would not be certain.

25 X Q. Then you can't be certain that you have communicated with all the drummers who were in your employ in 1886, can you?

(Objected to as misleading and unwarranted by the previous testimony.)

939 A. I think we have. I instructed Mr. Still to be very sure that he found out from every man that had sold goods for us if they had been to Burlington, Kansas, within 6 months of the time referred to by Smith, and he informs me that they had not.

26 X Q. Then any knowledge you have depends upon whether Mr. Still did communicate with every drummer and did report correctly to you. Is that not true?

(Objected to as unwarranted.)

Q. Yes, sir; I depend upon him for his part of the information.

27 X Q. Do you lay out regular routes for your drummers, designating the exact cities they must visit, and did you do so in 1886?

A. No, sir; I don't think we give the exact cities; they had a general route, each one; generally confined to certain States.

28 X Q. Then, within those States, they could visit any cities they thought they were likely to sell goods at. Is that true?

A. Yes, sir.

29 X Q. And you did have drummers within the State of Kansas in 1886 trying to sell your thread?

A. I could not say certain. Kansas City is, I think, in Missouri.

30 X Q. You cannot say you did not have drummers in Kansas at this period, can you?

A. What period?

30 X Q. In the year 1886.

A. I could not say certain, but I think not.

Redirect by Mr. WITTER:

31 R. D. Q. If any of your agents or employees had been in Burlington, Kansas, at the time referred to by Frederick Smith, or had made any such representations, would you not have been able to discover it by the efforts you have already made?

(Objected to as calling for a conclusion.)

940 A. I think there is no doubt but that I could have learned the facts about it.

32 R. D. Q. Is it not a regular part of your business to know where your agents go?

A. Yes, sir.

Recross by Mr. BETTS:

33 R. X Q. You don't know just where they go, do you? I mean the specific cities where they are at definite times, do you?

A. We generally lay out their routes and give them instructions where to go. They may visit some places outside of those.

LYMAN R. HOPKINS.

Subscribed and sworn to before me this 28th day of October, 1887.

[SEAL.] W. H. KENYON,
Notary Public, N. Y. Co.

941 U. S. Circuit Court, Southern District of New York.

Sir PETER COATS *et al.*
v.
MERRICK THREAD Co. *et al.* } In Equity.

Proofs for Final Hearing on the Part of Defendants.

NEW YORK, *Feb.* 25, 1888—11 a. m.

Parties met pursuant to notice.

Present: Counsel for the respective parties.

Examination adjourned to 182 Third avenue, at 1.30 p. m.

Met pursuant to adjournment at 182 Third avenue, at 1.30 p. m.

Present: W. C. Witter, for defendants; Samuel R. Betts appearing on the part of complainants.

MORRIS ABRAHAMS, a witness called on the part of the defendants, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by W. C. WITTER, counsel for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Morris Abrahams; age, 18; live at 182 Third avenue; I am clerk in the general post office in this city.

2 Q. When do you go on duty?

A. At four o'clock p. m.

3 Q. Up to what time in the day do you sleep?

A. Till one o'clock; from twelve to one.

942 4 Q. When do you leave home for your duties at the post office?

A. About half past three.

5 Q. Between twelve and one and half past three o'clock what do you do?

A. I sometimes go out and read and sometimes tend the store.

6 Q. Does any other young man attend the store beside yourself?

A. No, sir.

7 Q. For how long has that been true?

A. There never has been any other young man here.

8 Q. Who attends the store besides yourself?

A. My father and mother.

9 Q. Did you ever hear of a spool thread known as Coats' thread?

A. Yes, sir; I think I have heard of it.

10 Q. Have you ever seen the advertising signs of that thread about the city?

A. Yes, sir.

11 Q. State whether you have ever sold any Coats spool thread.

A. No, sir.

12 Q. Did you ever sell any thread except in your father's store in 182 Third avenue?

A. No, sir.

13 Q. How do you know that you have never sold any Coats thread here?

A. Because we have never kept it here and I've never seen it.

14 Q. Do you mean that you have never seen a spool of Coats' thread?

A. No, sir; I never have seen a spool of Coats' thread.

15 Q. Who does the buying of the goods for your father's store?

A. My father.

16 Q. Do people sometimes ask for Coats' thread here?

A. Yes, sir.

943 17 Q. What do you say to such people?

A. That we haven't go it; don't keep it.

18 Q. Do people sometimes ask for a spool of thread without mentioning any name?

A. Yes, sir.

19 Q. What do you then give them?

A. I generally give them Clark's cotton.

20 Q. Did you ever sell any of Merrick's spool cotton?

A. No, sir.

21 Q. Questions 1 to 13, inclusive, of the deposition of Mrs. Sarah E. Hornblower are here read to you and you are asked whether you ever sold Mrs. Hornblower or any other person on December 6th, 1887, or at any other time any Coats thread.

A. No, sir.

22 Q. Then, if I understand you, Coats' spool thread has not been kept on sale at your father's store at any time, as far *so* you know; is that correct?

(Objected to as leading.)

A. Yes, sir.

23 Q. How long has your father kept the store at 182 Third avenue?

A. About eleven years.

24 Q. How long have you been a clerk in the United States post office?

A. About one year; it will be a year next week.

And being cross-examined by SAMUEL R. BETTS:

25 X Q. How long have you been selling thread at No. 182 Third avenue, New York?

A. Three or four years.

26 X Q. Were you selling thread in the store last December?

A. I don't understand what you mean by that question; do you mean that I sell it as a business?

27 X Q. I mean were you selling any thread in the store, 182 Third avenue, last December?

A. I might have been.

944 28 X Q. Don't you know that you did?

A. I may have sold it and forgotten about it; I don't keep a record of it.

29 X Q. You don't keep a record of anything you sell, do you?

A. No, sir.

30 X Q. You just sell over the counter and take in the money given you in payment; is that it?

A. Yes, sir.

31 X Q. And the chances are that on the 6th of December, 1887, during part of the day you were tending store and selling to customers; is not that likely?

A. Yes, sir.

32 X Q. But you can't remember what you sold, can you?

A. No, sir.

33 X Q. Or who you sold it to, can you?

A. No, sir.

34 X Q. And if a middle-aged lady had come in and bought three spools of thread and paid you for it two months and a half ago, about, it would not have attracted your attention particularly, would it?

A. No, sir.

35 X Q. Who do you buy your thread from?

A. I don't buy the thread.

36 X Q. Do you know who it is bought from?

A. No, sir.

37 X Q. How many different kinds of thread have you in the store now?

A. Three or four.

38 X Q. What are they?

A. Clark's O. N. T. and Clark's Mile-end, Brooks', Merrick's, and John J. Clark's.

39 X Q. You sell Merrick's thread, then, do you?

A. No, sir.

40 X Q. You mean you keep it and can't sell it?

A. No, sir; we keep it and I mean I don't sell it.

41 X Q. How long have you kept it?

A. Probably a month or two.

945 42 X Q. Who did you get it from?

A. Do you mean from what company?

43 X Q. I mean who did you get it from.

A. I didn't get it from any one; I didn't buy it.

44 X Q. Who bought it?

A. My father.

45 X Q. How did he happen to buy it?

A. I don't know.

46 X Q. When did he buy it?

A. I don't know.

47 X Q. When did you first see a spool of Coats' thread?

A. I have never seen it.

48 X Q. You don't buy any of the thread that is put in stock in your store, do you?

A. No, sir.

49 X Q. And you only sell a small part of it that is sold, don't you?

A. Yes, sir.

50 X Q. How do you keep your thread, whereabouts?

A. On the counter in the store.

51 X Q. In what?

A. A cabinet.

52 X Q. Whose cabinet?

A. Clark's O. N. T.

53 X Q. You keep all your thread in this cabinet, do you?

A. No, sir.

54 X Q. Where do you keep the rest of it?

A. We have three or four cabinets.

55 X Q. Will you show me, now, in your store, your thread and how you keep it?

A. Yes, sir; I will.

(Complainants' counsel examines in the store the stock of cotton thread on hand, opening several drawers of the Clark cabinet and one drawer of the Merrick cabinet.)

56 X Q. How many varieties of thread do you keep in that Clark cabinet?

946 A. About three.

57 X Q. Don't you keep four?

A. Yes, sir; there might be four.

58 X Q. Will you testify that there are not five different varieties in that cabinet?

A. I don't believe there is five.

59 X Q. Will you swear that there are not five different varieties in that Clark cabinet?

A. No, sir; I wouldn't say whether there's more or less.

60 X Q. Will you swear that there are not six varieties in that cabinet?

A. There may happen to be one or two odd ones in there; I don't know; I know there is not six kept in there.

61 X Q. There may have been one or two odd ones different from those you generally keep in that cabinet; is that what you mean?

A. I mean there may have been one or two we do keep, but don't sell.

62 X Q. Are not those spools in that Clark cabinet where you keep your thread all mixed in; the different varieties in the same drawers mixed together?

A. They are.

63 X Q. Is not that cabinet situated just about the middle of the store?

A. Yes, sir.

64 X Q. What is the size of your store?

A. About 40 x 14, I should judge.

65 X Q. When did you first learn that you would be asked to testify in this spool matter?

A. Yesterday, Friday.

66 X Q. Who told you?

A. Mr. Witter, I think his name is.

67 X Q. How long ago did that Merrick cabinet I saw down-stairs come into your store?

A. About two or three months ago.

68 X Q. That has Merrick thread in it, has it not?

A. Yes, sir.

69 X Q. You can't swear positively that there has never

947 been a spool of Coats' thread brought into this store, 182 Third Ave., since Mr. L. Abrahams, your father, began business here, eleven years ago, can you?

A. No, sir.

70 X Q. Only you think you have not noticed any such spool or you don't remember noticing any such spool?

A. I have never seen any such spool.

71 X Q. Not to your recollection; is that it?

A. I haven't seen any at all.

72 X Q. When you are asked for three spools of a certain kind of cotton what do you do; how do you get them and wrap them up usually?

A. I never have sold any but Clark's or Mile-end, and if they ask for any other I say I haven't got it. I generally wrap them up in paper.

73 X Q. Do you go to the Clark cabinet where all these different varieties are mixed in together and pick out three spools and wrap them up in paper and hand them to the customer and take the money; does that state it?

A. Yes, sir.

74 X Q. Did you never sell any Brooks' spool cotton?

A. No, sir.

75 X Q. You have got it in that Clark cabinet, have you not?

A. Yes, sir.

76 X Q. Did you never sell any Willimantic spool cotton?

A. No, sir.

77 X Q. You have got that also in that Clark cabinet, have you not?

A. Yes, sir.

78 X Q. Did you never sell any John J. Clark spool cotton?

A. No, sir.

79 X Q. You have got that also in that Clark cabinet, have you not?

A. Yes, sir.

948 80 X Q. You sell all your spool thread in small quantities—a few spools at a time—do you not?

A. It is very seldom I sell more than one; they generally only call for one spool.

81 X Q. And you sell constantly to strangers whom you would not recognize again, probably, don't you?

A. Yes, sir.

82 X Q. Can you mention any kind of thread that you know of that you have not got in stock except Coats', as you say?

A. Probably; Kerr's is the only one I can remember.

83 X Q. Did you ever have that?

A. No, sir.

And being further examined, he says:

84 R. D. Q. Have you any Coats' cabinet or have you ever had?

A. No, sir.

85 R. D. Q. What proportion of the thread in the Clark's cabinet is Clark's O. N. T. thread, as near as you can judge?

A. About three-fourths of it.

86 R. D. Q. And the cabinet is a Clark's O. N. T. cabinet, isn't it?

A. Yes, sir.

MORRIS ABRAHAMS.

Subscribed and sworn to before me this 25th day of Feb'y, 1888.
W. H. KENYON,
[SEAL.] *Notary Public, N. Y. Co.*

L. ABRAHAMS, a witness called on the part of the defendants, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter in controversy herein, and being examined by W. C. WITTER,
949 counsel for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Leopold Abrahams; 42 years old; reside 182 Third avenue; keep a dry-goods and notions store at the same number.

2 Q. How long have you conducted such a business at that number?

A. Eleven years next May.

3 Q. Have you had any clerk or assistant in your store except your son, who has just testified, and your wife?

A. Never kept a clerk in my life.

4 Q. Do people sometimes spell your name Abrams?

A. They might.

5 Q. How many cabinets have you in the store in which you keep spool-cotton thread?

A. Two, I think.

6 Q. What are they?

A. O. N. T. Clark's, and I have got one cabinet of Merrick's.

7 Q. Of whom did you first buy your Merrick thread?

A. M. Rosenberg & Co.

8 Q. About when was it, as near as you remember?

A. I couldn't tell unless—I couldn't tell unless I would look in the book or the bills. The book doesn't say; the bills, rather.

9 Q. Do you sell Coats' spool thread or keep it for sale?

A. No, sir; no, sir.

10 Q. Did you sell it or keep it for sale in December, 1887?

A. No, sir.

11 Q. How many years is it that you haven't sold Coats' thread or kept it for sale in your store?

A. To my recollection, not within four or five years or more, perhaps.

950 12 Q. And who does the buying for your business?

A. I myself only.

13 Q. Do you think it possible for any one to have bought any Coats thread at your store here last December?

(Objected to as incompetent and immaterial.)

A. Impossible.

14 Q. Why?

A. I haven't kept it at that time; positive.

15 Q. How long is it since you have had any Coats thread in the store?

A. Possible I couldn't tell how long. I couldn't tell how long; not in four or five years; how many years.

16 Q. How is spool thread asked for and bought and sold?

(Objected — as not in rebuttal or answer to complainants' last testimony.)

A. I don't know what you mean by that. I sell whatever is called for, so I can understand it.

17 Q. How is it called for?

(Same objections.)

A. How is it called for? I think it is the same answer. I sell whatever is called for. I think so.

18 Q. Explain what you mean by selling what is called for.

(Same objection.)

A. Customer comes in and asks for an article. I am ready to sell; too glad to sell.

19 Q. How does the customer indicate to you which thread he wants?

(Same objection.)

951 A. Well, we suppose I want a spool of cotton. I give—well, whichever cotton comes across me the handiest—that is, if she don't ask for a particular name or make. All I do ask her is the number and the color, white or black.

20 Q. What particular name and make do you keep and sell the most of?

A. Clark's O. N. T.

Cross-examined by SAMUEL R. BETTS:

21 X Q. From whom do you buy your Coats' cotton?

A. I cannot positively swear from whom; I don't remember—yes; I can guess, but I can no positive swear. If you wish, I can maybe give you the house, but I don't believe.

22 X Q. Give me your best recollections of who it was you bought Coats' cotton from.

A. I think I can only give you either of Bates, Reed & Cooley, or M. Rosenberg & Co.; that's the only particular places where I got it; 69 Bowery.

23 X Q. For how many years did you buy Coats' spool cotton?

A. I don't know; I cannot remember.

24 X Q. About how many?

A. I don't remember; I can't remember.

25 X Q. Can't you remember when you last bought it?

A. No, sir; I can't remember.

26 X Q. Or how much you bought?

A. I cannot remember.

27 X Q. Or how much you had on hand when you stopped buying of the Coats cotton?

A. Same answer; I cannot remember.

28 X Q. When do you last remember having sold any?

A. Same, same answer; I cannot remember; it's an impossibility.

29 X Q. Or who you sold the Coats cotton to last?

A. Same answer.

30 X Q. Or when it was last sold in your store?

A. Same answer.

952 31 X Q. Did you keep the Coats' spools in the Clark's cabinet?

A. Not in this cabinet where you saw this one; I kept another Clark's cabinet; two-drawer cabinet.

32 X Q. How long have you had the present Clark's cabinet in which you keep your thread now?

A. In the neighborhood between two years; now, in the neighborhood of two years; a few weeks more or less; in the neighborhood of two years, about.

33 X Q. Are not the different varieties of spool cotton you have in stock mixed up together in the drawers of this cabinet; several varieties in the same drawer?

A. Yes, sir; ye——

34 X Q. How many varieties have you in there all together?

A. I believe there are six varieties.

35 X Q. Are all those varieties sold in your store?

A. Yes, sir.

36 X Q. And you keep Merrick's spool thread also in stock, do you not?

A. Yes, sir.

37 X Q. At what price per spool did you sell Coats' thread?

A. Maybe five, maybe six, cents.

38 X Q. And what price Clark's O. N. T.?

(Question is objected to unless he states when he means, whether now or some other time.)

A. Five or six years ago we sold all the cotton at six cents; I believe so.

39 X Q. And now you sell it all at five?

A. Yes, sir.

40 X Q. Was not your son, who has just testified, selling in your store during last December?

A. Maybe he did.

42 X Q. And during the first week of last December was he not selling in your store in the afternoons?

953 A. Was it a week day or a Sunday on the sixth day of December?

42 X Q. A week day.

A. No, sir; impossibility. I want to know the question.

(On the suggestion of defendants' counsel witness asked to have the question read over.)

43 X Q. Re-read.

A. What time in the afternoon; what do you call afternoon?

44 X Q. Noon is twelve o'clock, afternoon is after that, and during the afternoon is some time after 12 o'clock noon. Now please answer the question No. 41.

A. He might be. He could have sold.

45 X Q. Don't you think he did?

A. Same answer.

46 X Q. If a person came in and asked for Coats' thread last December and you happened to find a spool in stock you would have sold it, would you not?

A. If I had and they should ask for it, yes.

47 X Q. Haven't you got some spools in your stock that you have had for some time?

A. Maybe one there. I don't know.

48 X Q. You may have some spools that you have had two or three years of the brands you don't sell much of. Is not that possible?

A. I don't think there is.

49 X Q. You can't tell when you get all the different spools mixed up in that Clark's cabinet in your store, can you?

(Objected to as incomprehensible.)

A. Can't tell what? Let's see.

50 X Q. You can't tell when you got each one of these spools of the different brands lying mixed up in that Clark's cabinet, can you?

A. Well, I don't know about that. I don't know whether I could or not.

954 51 X Q. Do you mean to say that if I picked out a spool of cotton lying in that cabinet, mixed in among the other brands, that you could tell me the date when you bought that spool?

A. I could not tell it.

52 X Q. How do you wrap up the spools you sell?

A. In parcels or in other merchandise, whatever they purchase.

53 X Q. What wrapping paper do you use?

A. Plain wrapping paper, unprinted.

54 X Q. Brown wrapping paper?

A. Light brown.

55 X Q. Has it your name or address or any printed matter on it?

A. No; nothing.

56 X Q. Have you anything that will show the last purchase by you of Coats' cotton?

A. Impossible.

57 X Q. Have you no books, bills, memoranda, or anything to show it or to show from whom you last bought it?

A. Oh, no.

LEOPOLD ABRAHAM.

Subscribed and sworn to before me this 25th day of Feb'y, 1888.

W. H. KENYON,

[SEAL.] *Notary Public, N. Y. Co.*

Examination adjourned till Monday morning, February 27th, 1888, at 11 o'clock a. m., at offices of Witter & Kenyon, 32 Park place, N. Y.

NEW YORK, *February* 27, 1888—11 a. m.

Examination adjourned to same day, at 12 m.

NEW YORK, *February 27th*, 1888—12 m.

Parties met pursuant to adjournment.

Present: W. C. Witter, Esq., counsel for defendants, and Samuel R. Betts, counsel for complainants.

955 HENRY CUMMINS, a witness called on the part of the defendants, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein and examined by W. C. WITTER, counsel for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Henry Cummins; 46 years old; residence, Washington, N. J.; occupation, merchant.

2 Q. Are you sometimes addressed by the name of Henry Cumming instead of Cummins?

A. Yes; sometimes.

3 Q. Is there any one in Washington, N. J., who sells spool thread or fancy goods by the name of Henry Cumming or Henry Cunningham so far as you know?

A. No; there is no one of that name.

4 Q. What threads upon spools have you principally sold for the last seven or eight years at Washington, N. J.?

A. Coats', Clark's, Kerr's, and Merrick's and Chadwick's.

5 Q. When did you first put in your stock of Merrick's 200-yard spool thread?

A. October 2d, 1885.

6 Q. Give all the dates of your purchase of Merrick's thread from anybody.

A. October 2d, 1885; December 1, 1885; December 19, 1885; January 8th, 1886.

7 Q. Have you bought any Merrick's thread or put any Merrick's thread into your stock since January 8th, 1886?

A. I have not.

8 Q. When you have put in Merrick's thread into your stock have you put it in in place of Coats' any more than in place of Clark's or Kerr's?

A. No, sir.

(Objected to as leading.)

956 9 Q. Up to what time have you continued to buy and sell Coats' cotton?

A. I always buy Coats' cotton. I always keep it on hand. I think the last cotton I bought was Coats'.

10 Q. Why did you put in Merrick's cotton into your stock?

A. Because I bought it for less money.

11 Q. And you get the same price per spool for it as Coats' and Clark's and Kerr's, do you not?

A. Yes, sir.

(Objected to as leading.)

12 Q. Did you have any other reason for putting in Merrick's thread?

A. No, sir.

13 Q. A witness by the name of Walter Miller, examined for complainants on January 9th, 1888, says in answer to question 10 that "Henry Cumming, of Washington, N. J., told me that he thought he could sell Merrick's thread in the place of Coats' because the spools looked so much alike." Did you ever make any such statement or say anything that could bear any such construction to Walter Miller or anybody else?

A. I have no recollection of any such thing.

14 Q. Would you be likely to remember it if you had said any such thing?

A. I think I would.

15 Q. State whether any one has called upon you within two or three months and tried to induce you to remember that you had said some such thing to Walter Miller, and, if there has, state whom the person represented.

A. There was—a gentleman by the name of Thomas, I think, with Auchincloss Bros., agents for the Coats.

16 Q. What did you tell him?

A. I told him that I had no recollection of telling Miller any such thing.

17 Q. On saying that you have sold Clark's thread, which Clark do you mean?

957 A. Clark's O. N. T. and Clark's Mile-end. I have sold both kinds.

18 Q. Which thread have you sold the most of in your business?

A. Coats'.

19 Q. About how many dozen of Merrick's thread did you buy at your last purchase?

A. Fifty dozen.

20 Q. Give the amounts of the other bills with their respective dates.

A. Oct. 2d, about 50 dozen; Dec. 1st, about 40 dozen; Dec. 19th, about 8 dozen; Jan'y 8th, 1886, about 50 dozen.

21 Q. For how long now have you been pretty well sold out of Merrick's thread, as near as you can judge?

A. I should say about eighteen months.

22 Q. You sell thread at retail, a spool at a time, do you not?

A. Yes.

23 Q. How do your customers ask for it?

(Objected to as immaterial and not in answer to complainants' last testimony.)

A. They come in and ask for the name of the thread generally.

24 Q. Illustrate what you mean by asking for it by the name.

(Same objection.)

A. If they want any particular make of thread they would ask for the particular make.

25 Q. As what, for example?

(Same objection.)

A. If they wanted Coats' they would ask for Coats'; if they wanted Clark's they would ask for Clark's.

26 Q. And is the same true of Merrick's?

(Same objection.)

958 A. The same of Merrick's, and some ask for a spool of cotton without mentioning any name.

27 Q. Did you ever know of Coats' thread to be asked for or recognized in any other way than by the name?

(Same objection.)

A. I did not; not that I know of.

28 Q. How are these 200-yard spool thread universally recognized and distinguished from each other?

(Same objection.)

A. By their names.

29 Q. How long have you been engaged in selling these threads at retail to the consumer?

A. Over twenty-five years.

30 Q. State whether you have sold threads at wholesale; and, if so, what threads.

A. I have; Coats'.

31 Q. Which thread is better, six-cord or three-cord?

A. Six-cord; it brings the most in the market.

32 Q. If J. & P. Coats' thread, in any of its numbers from 8 to 200, was marked "three-cord," do you think they could obtain a "six-cord" price for such of it as was marked "three-cord"?

(Objected to as immaterial and incompetent.)

A. I don't think they could; I don't think they would ask it and mark it that.

33 Q. Do you think that you would recognize Walter Miller if you were to see him?

A. I think I would. I believe he has been in my store.

Examination adjourned to 1.30 p. m.

Met pursuant to adjournment.

Present: Counsel as before.

959 34 Q. Did you ever sell the Orrs and McNaught thread?

(Objected to as immaterial and not in answer to complainants' last testimony.)

A. I think I have a number of years ago.

35 Q. What is the best 200-yard spool thread as you understand it?

A. It is "six-cord."

36 Q. What difference in quality do you understand there is, if any, between the leading six-cord threads?

A. I don't think there is much, if any.

37 Q. What thread would you mention as the leading threads?

A. Coats', Clark's, Merrick's, Kerr's. I don't know so much about the Willimantic.

38 Q. How long did you sell spool thread as a wholesale dealer or jobber?

A. About four years as a salesman.

39 Q. So that, if I understand you, you have been engaged in selling thread either at wholesale or retail not very far from 29 years?

A. I have been engaged in it all my life from boyhood.

Being cross-examined by SAMUEL R. BETTS, Esq., he says:

40 X Q. How long have you known Walter Miller, salesman for Geo. A. Clark & Brother, whom you have mentioned?

A. I can't say. I don't know him very well. I think I would know him if I were to see him, but I don't know about that. I think I would.

41 X Q. From whom have you bought your O. N. T. thread?

A. I don't think I bought any from Geo. A. Clark direct. I think I bought it in my dry-goods bills.

42 X Q. Walter Miller has testified that he has been in your store at Washington, N. J. Is not that so?

A. He may have been.

960 43 X Q. And he may have been there about a year ago, the time he says. Is not that so?

A. That may be so.

44 X Q. And about a year or a year and a half ago you had some Merrick's thread in stock, did you not?

A. I had.

45 X Q. You cannot say you have not talked with Walter Miller, at your store, about the different brands of thread, can you?

A. I cannot.

46 X Q. And about Coats' thread and Merrick's thread, can you?

A. I cannot.

47 X Q. And about whether the Coats' and Merrick's spools, as Miller testified you did? You cannot say that he did not talk with you about that, can you?

A. I have no recollection of it.

48 X Q. You would not contradict his sworn testimony to that effect, except by saying you did not remember the occurrence. Is that it?

A. I don't remember it.

49 X Q. You have a good many drummers coming into your store, do you not?

A. I do.

50 X Q. And talking with you about the various kinds of goods you sell or that they want you to sell. Is that true?

A. It is.

51 X Q. And you wouldn't pretend to remember those conversations in detail or what you said or they said a year ago, would you?

A. I would not in detail.

52 X Q. You speak of a gentleman by the name of Thomas calling on you in regard to remembering this occurrence testified to by Miller. Did he do anything more than ask you whether you remembered it?

A. He asked me good many times, trying to jog my memory, but I could not remember the conversation with Miller.

961 53 X Q. He did not offer you any inducements, only talked to you on the subject. What is the fact?

A. Only inducement he held out to me if I could remember anyting of the conversation of Miller my expenses would be paid if I was called upon to testify; that is the first intimation I had that there was a controversy between the Coats and Merrick.

54 X Q. Don't you distinguish the different brands of spool cotton by their appearance; thus, between the two Clarks by one having a black spool and the other a white?

A. I could.

55 X Q. And don't you do so?

A. I don't think I do. I handle so little of either one of the Clark's.

56 X Q. But when you do handle it you notice that distinction, do you not?

A. I do not. I don't think I have two dozen in the store of all of Clark's cotton.

57 X Q. Between Kerr's and Coats' thread is there not a difference in the labels that makes them easily distinguished apart?

A. There is a difference in the spools of Kerr's and Coats' that don't look anything alike—that is, with that kind I handle of Kerr's. Kerr's is of the little short spools.

58 X Q. Then you distinguish them apart by their appearance, do you not?

A. I can.

59 X Q. And don't you in selling them?

A. Yes.

60 X Q. Do not the Merrick spools and labels bear a very close resemblance to the Coats to a person looking at them hastily or not reading the printing on them?

A. I think they do.

61 X Q. They both have the raised numbers around the edge of the spool, do they not?

A. Yes.

962 62 X Q. And no other spools have these as far as you know, do they?

A. Not that I know of; no.

63 X Q. Do not customers sometimes buy spool thread in this way,

by coming in and pointing at certain spools and saying, "Give me a spool of that"?

A. They generally ask for the kind they want.

64 X Q. Don't they sometimes buy in the way I have described?

A. I have no recollection of any; our spools are all in cases; they don't see the spools; they have to ask for the kind they want, and as a rule do.

65 X Q. Do not they sometimes simply ask for a spool of thread?

A. Yes.

66 X Q. And then what do you give them?

A. I give them the one that pays the best profit if I am waiting on the customer.

67 X Q. Do you sell any numbers higher than 100?

A. I keep numbers higher in stock.

68 X Q. Sales of numbers higher than 100 are very small, are they not?

A. They are.

69 X Q. Best six-cord thread of any of the makers indicates the best they make. Do you not so understand it?

A. I do.

70 X Q. Have you come here to testify at the request of the defendants?

A. I have.

71 X Q. Not under subpœna?

A. No, sir.

72 X Q. When did any one on their part first speak to you about testifying?

A. I should think about two or three weeks after I was seen by Mr. Thomas, of Auchincloss Bros.

73 X Q. And you told defendants' representative that you had no recollection of the occurrence Walter Miller testified to. Is that it?

963 A. I did.

74 X Q. I suppose defendants offered to pay your expenses?

A. They wrote me they would make it if I would come down.

Being further examined, he says:

75 R. D. Q. You have been asked as to the resemblance between Merrick's and Coats' article in cross-questions 60 and 61. Did you in your answer mean to be understood as referring to any point except to the fact that the number appears in the wood of the spool of both the Merrick and Coats?

(Objected to as leading.)

A. That is what I understood it.

HENRY CUMMINS.

Subscribed and sworn to before me this 27th day of Feb'y, 1888.

W. H. KENYON,

[SEAL.] *Notary Public, N. Y. Co.*

Examination adjourned to to-morrow at 1 o'clock.

NEW YORK, *February 28th*, 1888—1 p. m.

Parties met pursuant to adjournment.

Present: W. C. Witter, Esq., counsel for defendants, and Samuel R. Betts, counsel for complainants.

GEORGE LE BOUTILLIER, a witness called on the part of the defendants, having been by me duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and examined by W. C. WITTER, counsel for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. George Le Boutillier; age, 38; residence, New York city; business, dry goods.

964 2 Q. Retail or wholesale?

A. Retail.

3 Q. Including 200-yard spool thread; if so, which?

A. Yes; Clark's, Coats'.

4 Q. Which Clark's?

A. Clark's "O. N. T."

5 Q. Have you any knowledge or information through the regular channels of your business of a combination to which these two manufacturers belong?

(Objected to as incompetent and immaterial.)

A. I have information of a combination; I presume they both belong to it.

6 Q. What does that knowledge or information consist of, in part?

(Same objections.)

A. The combination is for the purpose of governing the price at which their goods shall be sold at retail and at wholesale.

7 Q. To what limit in amount?

(Same objections.)

A. That they shall not be sold at less than five cents a spool at retail?

8 Q. What means are taken to prevent the sale at less than five cents a spool?

(Same objections.)

A. Endeavors to prevent those merchants who sell at less than five cents a spool from obtaining their goods at any price.

9 Q. Do you sell Coats' and Clark's thread at less than five cents a spool; if so, at what price do you sell it per spool?

(Objected to as immaterial.)

A. Yes; at four cents per spool.

965 10 Q. And have you had difficulty in getting your spool thread as a result of the endeavors which you have referred to?

(Same objection.)

A. Yes.

11 Q. What does the difficulty consist in?

(Same objection.)

A. In refusal on the part of certain wholesale dealers to sell me the goods.

12 Q. And are you obliged to make your purchases of other jobbers?

(Same objection.)

A. I have to buy elsewhere.

13 Q. Did you ever buy directly of these manufacturers themselves instead of from the jobbers?

(Same objection.)

A. We were in the habit of buying from George A. Clark & Brother, the agents of Clark's "O. N. T.," up to a certain time.

14 Q. State how you happened to cease buying of them.

(Same objection.)

A. We ceased buying of them because they would not sell to us unless we would sign an agreement binding us to sell their cotton at such price as they should dictate.

15 Q. Was that a price known as the combination rate?

(Same objection.)

A. Commonly so called.

16 Q. Do you know of circulars being issued bearing on this matter?

(Same objection.)

966 A. Yes; when jobbers refused to my buyer to sell him Clark's cotton they stated as a reason that they were prohibited from so doing by printed instructions from the manufacturers of the cotton, these printed instructions bearing our name as one among several firms to whom their cotton should not be sold.

17 Q. And what did you understand was the sin you had committed?

(Objected to as incompetent and immaterial.)

A. That we had sold the cotton at less than five cents per spool.

18 Q. What, if anything, did you lose by being compelled to buy of the jobbers instead of the manufacturers?

(Objected to as immaterial.)

A. We lost 9 per cent. on the gross amount of purchase.

19 Q. When it becomes known to the combination from what jobbers you now purchase your thread is it your presumption that notice will be given to them also and your trade interfered with?

(Objected to as incompetent and immaterial.)

A. It is.

20 Q. If you can produce an example of such printed notification as you have referred to please do so.

(Objected to as immaterial.)

A. I here produce one.

(Defendants' counsel here offers the paper produced in evidence, and it is marked "Defendants' Exhibit No. 62, Combination Notice to Jobbers.")

(Objected to as immaterial.)

967 21 Q. Where is your place of business? And state name and style of the concern.

A. Le Boutillier Bros., Broadway and 14th street.

22 Q. Are you willing to state the extent of your retail business in Coats' & Clark's spool thread?

A. I prefer not to.

23 Q. Why do you prefer not to?

A. Because the larger they should know my business to be the more interest they would have in obstructing it.

24 Q. Do you sell as many as 50 dozen a day of these spool threads?

A. There is many a day when we sell 50 dozens; our sales vary.

25 Q. Do you sell to consumers only?

A. Yes.

26 Q. What is the largest quantity that you sell, and from that down to what?

A. As a general rule we limit a customer to three dozen at a time, though in particular instances where we know a purchaser to be a regular customer of the house we exceed the limit. We sell from that amount down to the single spool. We have this limit in order to restrict ourselves to supplying consumers only, not other dealers.

27 Q. In selling a dozen or more do you sell the dozen box along with the thread so that the dozen boxes containing the thread go to the consumer?

A. Where we sell a dozen of a number the box goes with the thread, and that is a very common sale. The leading numbers are commonly bought by the dozen.

28 Q. Of how many cords has it been your understanding that this 200-yard spool thread of Clark's O. N. T. and Coats' is made of?

A. Six-cord.

29 Q. Has this been your understanding of all the numbers from 8 to 200?

A. Yes.

30 Q. How is it understood among the clerks who sell and the buyer who buys this thread for you?

(Objected to as incompetent.)

968 A. That all their numbers are made of six cords.

31 Q. Do you sell Merrick's thread?

A. Not now.

32 Q. How long is it since you have sold Merrick's 200-yard six-cord thread?

A. Several years.

33 Q. How are the various six-cord 200-yard spool threads distinguished from each other?

A. By the names of the makers.

34 Q. For example?

A. Clark's O. N. T., Clark's Mile-end, Coats', Willimantic, and Merrick's.

35 Q. Did you ever know of their being distinguished in any other way than by their name?

A. No.

36 Q. How do you understand that the Clark's thread have an additional feature in the name, as O. N. T. and Mile-end?

A. I understand there are two manufacturers named Clark, and their threads are known respectively as Clark's O. N. T. and Clark's Mile-end.

37 Q. Do you think there is any such resemblance between the Merrick's and the Coats' 200-yard six-cord spools and labels as that either is likely to be taken for the other in the ordinary course of retail trade?

A. No.

38 Q. Speaking for the customer, what influence does the fact have that Coats' and Merrick's spools bear the wooden numbers on the ends toward causing either brand to be mistaken for the other?

A. No influence.

39 Q. Why not?

A. Because the cottons are known by their names, not by the number which designates the size.

40 Q. What has the appearance of the numbers on the wood as they appear in those threads to do with determining the brand of the thread, if anything?

A. Nothing.

969 41 Q. What are the purpose and utility of those wooden numbers?

A. To designate the size of the thread.

42 Q. What utility in their appearing several times in the wood of the spool?

A. That at least one number is always upright.

43 Q. Which is the more permanent method of indicating the size of the thread?

A. The stamp or impression on the wood.

And, being cross-examined by SAMUEL R. BETTS, the witness deposes and says:

44 X Q. How long have you sold Coats' thread?

A. I couldn't state without referring to my books; we have probably kept it several years.

45 X Q. Give me about how long, as near as you can.

A. It is quite probable we have sold it for every year for the last ten years; we have it for sale this year.

46 X Q. Have you never sold it for five cents a spool?

A. I believe we have.

47 X Q. How long is it since you did so?

A. I think we have not sold it for five cents within five years, possibly not for seven years.

48 X Q. From whom do you buy your Coats' cotton?

Defendants' counsel states to the witness that if the disclosure of the vender would, in the opinion of the witness, be an injury to his business as disclosing what he considers a secret of his business, he need not answer this question until instructed to do so by the court.

A. Under the advice of counsel I decline to answer it.

49 X Q. Why do you decline to answer that question?

A. Because I consider it a purely private matter and might be an injury either to me or to the parties from whom I buy it to have it known.

970 50 X Q. Do your books show from whom you buy Coats' cotton?

A. They may show it.

51 X Q. Have you ever received any notices from Coats' agent in regard to your selling below the trade price?

A. Not as far as I recollect.

52 X Q. Or from Clark's or their agents for either O. N. T. or Mile-end cotton?

A. We received verbal notice from Clark's O. N. T.

53 X Q. You have no actual personal knowledge of what you call a combination to which Clark's O. N. T. and Coats' belong in regard to selling thread, have you?

A. My knowledge is derived largely from my buyers, who come in personal contact with either the direct agents of or wholesale dealers in the cottons.

54 X Q. And what knowledge you have is derived from the statements of other people and is not a personal knowledge of your own otherwise than from their statements. Is that so?

A. In regard to the question, the question is so general that I cannot answer it. If you were to ask me in regard to my knowledge concerning what I might answer it.

55 X Q. Please hear the last two questions and answers read and then see if you do not understand the last question and cannot answer it.

A. My knowledge concerning combination of manufacturers is derived largely from information obtained from my buyers.

56 X Q. It is derived entirely from information obtained from your buyers or statements made by other persons not members of the combination, is it not?

A. I believe it is.

57 X Q. And your understanding of what you call the combination is that certain manufacturers have agreed on a fixed price at

which their goods shall be put on the market and try to have
971 them sold at that price. Is that a correct statement of your understanding?

A. I believe it is.

58 X Q. You have been for a number of years cutting the Coats price, have you not?

A. We have been selling at less than what we have understood to be the price which they wish to have maintained.

59 X Q. And have been acting in opposition to them to that extent, have you not?

A. We have been acting independently of them.

60 X Q. Is there a profit to you in selling Coats' thread at four cents a spool?

The witness is instructed by defendants' counsel that if, in the witness' opinion, it would injure his business to make disclosure called for he need not make it till called for by the court.

A. Under advice of counsel, I decline to answer.

61 X Q. Why do you sell it at four cents a spool?

Same instruction.

A. For private reasons of my own I sell it at four cents a spool.

62 X Q. At what price do you buy it?

Same instruction.

A. Under advice of counsel and because I believe it would be an injury to myself and the persons from whom I buy, I decline to answer.

63 X Q. Can't you get as much Coats' thread as you want to sell?

A. That would depend largely upon the quantity which I wished to sell.

64 X Q. It depends not on that, but on the quantity people want to purchase from you; do you not get enough to supply the demands of your customers?

A. I don't agree with the statement. In answer to the question I think, as a rule, we have enough on hand to supply what is called for.

972 65 X Q. How long ago did you cease buying from George A. Clark & Brothers?

A. I should think fully five years ago.

66 X Q. Don't you sell your spool cotton at four cents a spool as an advertisement in order to attract trade, although it gives you no profit?

Same instruction.

A. Under advice of counsel and believing it might be an injury to my business or to those from whom I buy, I decline to answer.

67 X Q. Does not the fact of certain firms selling spool cotton at a loss in order to advertise their own business tend to break the regular prices and make it difficult, if done on any large scale, for

manufacturers to make their legitimate profit? What is your opinion?

A. Should a spool of cotton be universally sold by jobbers and retailers at a loss, I believe the consumption would be largely increased and the manufacturers to that extent be benefited.

GEO. L. BOUTILLIER.

Examination adjourned for further cross-examination to a time of which defendants' counsel will give complainants' counsel one day's notice.

NEW YORK, *March 10th*, 1888—12 m.

Met pursuant to adjournment and notice made at close of Chicago testimony.

Examination further adjourned to March 12th, 1888, at 11 a. m.

973 NEW YORK, *March 12th*, 1888—11 a. m.

Examination further adjourned to March 13th, 11 a. m.

Met pursuant to adjournment.

Examination further adjourned to 2 p. m. same day at 48 East 14th St.

NEW YORK, 48 E. 14TH ST., *March 13th*—2 p. m.

And being further cross-examined:

68 X Q. Do you really mean to be understood in your last answer as stating that it would in effect benefit the manufacturers of spool cotton if jobbers and retailers were to systematically sell it at a loss?

A. I mean this: that if the manufacturers' price should be five cents a spool or four cents a spool, that if the jobber and retailer should sell respectively at four and three cents the consumption would be greater than if they sold at six or five respectively—that is, the lower the cost to the consumer the greater the consumption.

69 X Q. Is that true of a staple article like spool thread, which must necessarily be used?

A. Yes.

70 X Q. Can you give any reason why these thread manufacturers should try to keep a fixed price of five cents a spool on spool cotton when, in your opinion, they would make larger profits if the retailers or jobbers sold at a lower price than five cents?

A. No.

71 X Q. Can you not see any advantage in having a fixed uniform price which yields a profit to the retailer as well as to the manufacturer?

A. I do not think it is any advantage. I can state an example in point.

974 72 X Q. Would not the sale of spool thread—say Coats' and Clark's—at five cents a spool give the retailer a profit in view of the prices at which the manufacturers sell those makes of thread?

A. It would give a small profit.

73 X Q. The only reason you know of why Geo. A. Clark & Brother do not sell to you direct is because you will not agree to maintain the schedule prices at which almost all sell their thread who deal in it at retail. Is that so?

A. It is several years since Geo. A. Clark & Brother refused to sell us. It was then because we declined to sign papers binding ourselves to sell at prices which they should dictate. I presume they would not sell us now unless we should sign similar papers. I do not wish to answer for the prices at which other dealers sell the cottons.

74 X Q. Do you not know as a matter of fact that Coats' and Clark'- and other spool thread of the grade known as six-cord is almost universally sold at retail at five cents a spool? Is it not so sold by almost every firm you know of dealing in spool cotton of those makes and that grade?

A. I think it is not universally sold at five cents. I have not bought any personally, but I am informed from some *as* which I believe to be reliable that at least half a dozen houses in New York city sell for less than five cents a spool at retail.

(Last clause of answer objected to as hearsay.)

75 X Q. Did you ever know of Coats or their agents issuing a printed circular or notification like the one marked "Defendants' Exhibit Combination Notice to Jobbers"?

A. No.

76 X Q. Why do you limit a customer to three dozen of spool thread at a time, as a general rule?

A. Because consumers rarely desire to buy more than that quantity at a time.

975 77 X Q. Why are you not willing to sell as much as you can of spool thread at the price you have put upon it?

A. Because of the difficulty of obtaining the cotton put in our way by the manufacturers' agents.

78 X Q. Will you testify that it is not because of the fact that you do not make a profit by selling at four cents a spool that you refuse to sell at such small quantities?

(Question objected to, first, because no such fact has been shown as the question implies; second, because the fact clearly appears from the testimony herein that any of the combination threads, to wit, the Willimantic, the two Clarks, and the Coats, can be sold by the retailer at four cents a spool and leave a profit in his hands.

Complainants' counsel objects to the above statements of fact as incorrect and unwarranted.)

A. I will testify that if all restrictions now placed upon the sale of cottons should be removed that we would supply all customers in any quantity.

79 X Q. What proportion does your sale of Coats' cotton of the numbers over one hundred bear to your total sale of Coats' cotton?

A. I do not know.

80 X Q. It is a very small proportion, is it not?

A. I believe so.

81 X Q. Why do you not sell Merrick's thread now?

A. It's hard for me to say; probably because we have makes of cotton enough.

82 X Q. You say you did sell it. Why did you stop selling it?

A. I do not recall the precise reason.

83 X Q. Is it ever asked for by your customers?

A. I do not know.

84 X Q. Did you ever hear of its being asked for by your customers since you stopped selling it?

976 A. No demands for it have been reported to me.

85 X Q. Do you know of any spools, except Merrick's or Coats', that have the raised or embossed numbers around the label on the spool head, showing the size of the thread?

A. No.

86 X Q. Are not those raised numbers an element of similarity between the Merrick's and Coats' spools in their appearance?

A. It is a point of similarity.

87 X Q. Did you ever buy a Merrick's spool at retail?

A. I don't recall having done so.

88 X Q. Or a Coats spool?

A. I do not recall that either.

And being further examined, he says:

89 R. D. Q. What sources can you mention from which your information is derived that other houses in New York city than your own sell the combination threads or either of them at less than five cents a spool at retail?

(Objected to as incompetent.)

A. Advertisements in the daily papers, statements from my own employés and from other people in the dry-goods business, and from Clark's circular to jobbers.

(Answer objected to as hearsay.)

90 X Q. Since your examination on the 27th of February what, if anything, has come to your ears as to efforts to discover from whom you buy your Clark's thread and by whom the efforts were made?

(Objected to as immaterial, the Clark thread not being involved in this controversy.)

A. An employé of a dealer in cotton called upon me in this office and stated that he was sorry that his house was forced to de-

977 cline to fill an order for cotton which had been left with him either that day or the day before by my buyer. He further stated as a reason that a Mr. Clark, of the firm of Geo. A. Clark & Brother, had called at his office and personally threatened to deprive them entirely of Clark's cotton should they deliver any to us,

and that his firm did not wish to lose the profit which they made on these cottons.

(Answer objected to as immaterial and hearsay.)

GEO. LE BOUTILLIER.

Subscribed and sworn to before me this 28th day of Feb'y, 1888.
[SEAL.] W. H. KENYON,
Notary Public, N. Y. Co.

Examination adjourned to 32 Park place, at 11 a. m., March 14, 1888.

United States Circuit Court, Southern District of New York.

Sir PETER COATS *et al.*
vs.
MERRICK THREAD COMPANY *et al.*

Proofs for Final Hearing on the Part of the Defendants.

PALMER HOUSE, CHICAGO, *March 1st*, 1888—2 p. m.

Parties met pursuant to notice.

Present: W. C. Witter, for defendants, and Samuel R. Betts, for complainants.

Depositions of witnesses taken before me, Henry W. Prouty, a notary public, pursuant to the Revised Statutes of the United States and to notice.

978 OTTO C. FISCHER, a witness of lawful age, called on the part of the defendant-, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein and being examined by W. C. WITTER, counsel for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Otto C. Fischer; 27 years; Chicago; I am a retail dry-goods dealer.

2 Q. Where is your store located?

A. At No. 161 North avenue, Chicago.

3 Q. Is it a part of your business to sell spool thread at retail?

A. Yes, sir.

4 Q. What spool thread have you sold at retail, referring to 200-yd. thread of six-cord.

A. Coats', Willimantic, Kerr's, Clark's, Chadwick's.

5 Q. How long have you been selling these threads or some of them at retail?

A. About 12 years.

6 Q. You did not mention Merrick's thread among the threads that you had sold. Have you never sold Merrick's thread?

A. No, sir.

7 Q. Has it ever been kept at your store?
A. No, sir.
8 Q. Have you ever bought any of it?
A. No, sir.
9 Q. When did you first see a spool of Merrick's thread?
A. On January 13th, 1888.
10 Q. Who showed it to you and who were present at the time?
A. E. A. Still showed it to me and Mr. L. R. Hopkins. Mr. Witter and Mr. Still were present.
11 Q. Is there any other person by the name of O. C. Fischer except yourself at 161 North avenue, Chicago?
979 A. No, sir.
12 Q. How long have you sold dry goods, including spool thread, at that place?
A. About four years and a half.
13 Q. Which of these spool threads that you have mentioned are you now selling?
A. Coats' and Willimantic.
14 Q. Prior to January 13, 1888, did you ever have a conversation with any person regarding the similarity or dissimilarity of the Merrick and Coats spools or labels?
A. No, sir.
15 Q. Did you ever at any time say that you didn't think people generally could tell Merrick's from Coats'?
A. No, sir.
16 Q. Did you ever say that you thought you could sell it as well as Coats' because you didn't think people generally could tell it from Coats'?
A. No, sir.
17 Q. Did you ever speak to any one of your ability to sell Merrick's for Coats' or of people being deceived in the appearance of the spools?
A. No, sir.
18 Q. Have you ever said anything which would bear such a construction or which in substance was the same as the questions 14–17, inclusive?

(Objected to as incompetent.)

A. No, sir.
19 Q. Are you acquainted with P. V. Root, of Chicago?
A. Yes, sir.
20 Q. In a deposition given for complainants recently this Mr. Root was made to state in substance that you had made such statements to him as are embodied in questions 14–18, inclusive. Have you seen Mr. Root within a day or two? And, if so, state whether or not he has told you that he was mistaken in the testimony
980 he gave regarding you and your statements touching the Merrick and the Coats thread.

(Objected to as incompetent and immaterial, and the words "made to state" in the above question objected to as improper and without any foundation in facts which have been proved.)

A. I saw him last on Tuesday, February 28th. He told me that the evidence he gave in New York was not positive evidence, and that he was merely under the impression that it was I who had told him so.

21 Q. Did he also tell you that he had been subpœnaed to give testimony in this case this week?

(Objected to as immaterial.)

A. Yes, sir; he told me so.

22 Q. How are the various threads you have dealt in asked for by customers?

(Objected to as not in answer to complainants' last testimony.)

A. They are asked for by their names.

23 Q. How are they known and distinguished from each other?

(Same objection.)

A. By their different names.

24 Q. State what you mean by that.

(Same objection.)

A. I mean that if anybody asks for a certain thread, as Coats' thread, I give them Coats' thread; if they ask for Willimantic I give them Willimantic.

25 Q. Did you ever know of Coats' thread to be known, recognized, or asked for in any other way than by the name "Coats" or "J. & P. Coats"?

Same objection.

A. No, sir.

981 26 Q. Are you aware that both the Merrick's and the Coats' thread have figures or numerals appearing in the wood of the spool several times?

A. Yes, sir.

27 Q. What do these numerals indicate?

A. The number of the thread on the spool.

28 Q. Do you think it a useful thing to have the number of the thread so indicated in addition to the number appearing on the paper label?

A. Yes.

29 Q. State why.

A. Because in case the label should be lost the number on the spool indicates the number of the thread.

30 Q. And what is the advantage of having the number appear in the wood of the spool several times?

Complainants' counsel states that while the 28th question was being written he requested the notary to delay before asking it, as counsel desired to leave the room for a moment and consult with the representative of his client here, but that in spite of his protest defendants' counsel, Mr. Witter, has insisted on proceeding in his

absence. Complainants' counsel therefor- now objects to question 28 as incompetent and immaterial; also to question 29 on the same ground; also to question 30 on the same ground, and to questions 28, 29, and 30 as not in answer to complainants' last testimony.

A. I presume it is put on because no matter which way you turn the spool the number is always up.

Complainants' counsel requests defendants' counsel not to interfere with the examination of this witness by repeating what he thinks the witness answers before it is written down by the notary, as defendants' counsel did in connection with the last answer, but to allow the notary to take the testimony direct from the witness in the usual manner.

982 31 Q. Did you yourself make the answer to the last question in the language taken down by the examiner?

A. I did.

32 Q. Do you think there is any such resemblance between the Merrick's and the Coats' spools and labels as that there is any likelihood of one being mistaken for the other?

A. No, sir.

33 Q. How if the seller should practice deceit or the buyer want to be deceived? I suppose it might then be possible to sell one for the others. Is that so, or any other thread for Coats'?

A. In answer to that question, if the customer should come in and ask for a certain thread he expects to get that thread. If you wish to deceive her you can wrap up the spool without her seeing it and she will not be aware of it until she opens her package at home. She will return that thread if she don't want it, which happens very frequently.

34 Q. Such deceit as that could be practiced with any thread, could it not?

(Objected to as leading.)

A. Yes, sir.

35 Q. You have said that you have sold Chadwick's thread. Has that thread a black and gold label?

(Objected to as not in answer to complainants' last testimony.)

A. No, sir.

36 Q. What has resulted from that fact in your business?

(Same objection.)

A. I gave up using it on account of people thinking it an inferior thread, taking it for basting thread.

37 Q. Of how many cords is the inferior or basting thread?

A. Three cords.

983 Cross-examined by SAMUEL R. BETTS, of counsel for complainant:

38 X Q. How long have you been located at No. 161 North avenue, Chicago?

A. About four years and a half.

39 X Q. Then you were there in the fall of 1886, were you?

A. Yes, sir.

40 X Q. How long have you known Pierre V. Root, salesman for the Willimantic Thread Company in Chicago?

A. Something over two years.

41 X Q. Has he been in the habit of coming into your store?

A. Yes, sir.

42 X Q. And talking to you about thread?

A. Persuading me to buy his thread; yes.

43 X Q. How did he try to persuade you?

A. By saying it was just as good as Coats' thread, and that I could sell it just as well, and that I'd be doing him a great favor by putting it in, and various other arguments such as salesmen use to sell their goods.

44 X Q. Did he compare it with Kerr's, which you say you have also sold?

A. Possibly.

45 X Q. And with Clark's?

A. No, sir.

46 X Q. Do you mean to swear that he never spoke to you of Clark's thread?

A. To the best of my knowledge and belief he did not.

47 X Q. That is, you don't remember that he did, do you?

A. I mean to say that I will not swear to anything like that.

48 X Q. You will not swear that he did not mention Clark's thread to you?

A. No, sir.

49 X Q. And you will not swear that he did not mention Chadwick's to you, will you?

984 A. I will swear that he did not mention it.

50 X Q. What enables you to testify so about Chadwick's when you cannot about Clark's?

A. Because it was not being then introduced—that is, Chadwick's—up our way.

51 X Q. Have you any Merrick's thread in stock now?

A. No, sir.

52 X Q. Don't you know of its being sold in Chicago?

A. Yes, sir.

53 X Q. How long have you known of this?

A. Since about the 13th of January, 1888.

54 X Q. Do you mean to say you never heard the name of Merrick in connection with thread before January 13, 1888?

A. I mean to say no one tried to sell any of it before that time.

55 X Q. But you knew of such a thread before then, did you not?

A. Certainly.

56 X Q. How did you know of it?

A. Well, about the only way I knew of it was by seeing wagons delivering stuff.

57 X Q. Delivering it where?

A. Well, around town.

58 X Q. Around your neighborhood?

A. I've seen wagons pass my store.

59 X Q. How often do you suppose Mr. Root has been in your store during the last two years?

A. Well, I—at least fifty times.

60 X Q. And every time he has talked thread to you, has he not?

A. No, sir.

61 X Q. Well, about how often has he come in and talked to you about thread during the last two years?

A. That is more than I can tell.

62 X Q. A large number of times, has he not?

A. Not after I had once bought his thread, only when I objected to keeping his Willimantic any longer on account of dissatisfaction to my trade.

985 63 X Q. Well, he has been in frequently and talked to you about thread during the last two years, has he not?

A. As I answered in the last question, not after I had put in his thread, only in regard to the sales of his thread.

64 X Q. Has no one ever tried to induce you to purchase Merrick's thread?

A. Once on the 13th of January, 1888, and once since that time.

65 X Q. What inducements were offered to you to purchase Merrick's?

A. On that date not any—that is, on the 13th. Since then I was told that they sold their thread five cents less than any other—that is, Coats', Willimantic, or Clark's—and on that account would make it an object to me to handle it, and on that account it would be an object to me, being five cents less.

66 X Q. When you say five cents less do you mean five cents a dozen less or what?

A. I understood that Merrick's sold at fifty cents a dozen, while the others sold at fifty-five.

67 X Q. Who was it tried to sell Merrick's to you?

A. Mr. Still came in first, and since then a man whom I don't know.

68 X Q. Have you examined the Merrick spools and compared them with those of Coats as to similarity of appearance?

A. Yes, sir.

69 X Q. Is there not a great similarity in the fact that both have the raised numbers around the label on the spool head?

A. There is such a resemblance.

70 X Q. No other spool that you know of except Merrick's and Coats' have that point of resemblance, the raised numerals on the spool heads, have they?

A. No, sir.

71 X Q. Do not Merrick's spool heads—now you have seen them—bear a closer resemblance to Coats' than any other spool heads?

A. Yes.

986 72 X Q. Suppose the spool heads were at such a distance from the eye that the lettering on the paper label could not

be read, or suppose a person in a hurry or in a somewhat dark part of the store, not stopping to read or not being able to see very distinctly, don't you think the Merrick spools, having the similarity to Coats' which you have mentioned, could readily be mistaken for Coats' under such circumstances?

A. Well, as to that, not seeing the lettering from a distance or on account of darkness, I would be just as apt to mistake any thread for another until brought close to the eye, when it is easy to distinguish one from the other.

73 X Q. Do you mean to say that — is just as easy for an ordinary purchaser to distinguish Merrick's from Coats' by appearance as to distinguish Willimantic from Coats' by appearance?

(Objected to unless counsel states whether he means in his question the black and other colored thread of Willimantic, which, like the Coats black and colored thread, is put upon white spools, or the white thread of Willimantic, which has the additional difference in appearance from the Coats' white thread of being wound upon black spools.)

A. As far as distinguishing Willimantic from Coats' black thread, I mean to say this, that it is just as easy to mistake Willimantic black for Coats' as Merrick's. However, if a lady wants a white thread, Willimantic, being wound on black spools, is not as similar as Merrick's is to Coats'.

74 X Q. And the different appearance of the spools in the case of the Willimantic white thread would prevent people mistaking it for Coats', would it not?

A. Yes.

75 X Q. What is the best-known thread in this market?

A. Coats'.

987 76 X Q. Which is the longest-established thread-house, as far as you know?

A. I think it's Coats', so far as I know.

77 X Q. You spoke of giving up selling Chadwick's thread on account of the label leading people to think it was an inferior thread; suppose Chadwick imitated the spools of Coats to the extent that Merrick has, using the embossed or raised numbers around the paper label and a paper label as nearly similar to Coats' as Merrick's is, only retaining the name of Chadwick to distinguish it, do you think you would then have been obliged to give up using it on account of people thinking it an inferior thread, taking it for basting thread?

(The statement in the question to the effect or purport that the Merrick is an imitation in any respect of Coats' is objected to as contrary to the proofs in the case and not warranted by testimony.)

A. All machine cottons have gold and black labels, with the exception of Chadwick's, and for that reason it wouldn't sell.

78 X Q. Will you please hear my last question read again and see if you can answer more directly?

A. I cannot say whether I would have been obliged to give it up

under those circumstances or not; I have merely related my experience with it; that's all I can say.

79 X Q. I am asking for your opinion as a man who has had a number of years' experience in the business; what is your opinion?

A. Well, my opinion is that I can sell any thread under any label if I want to by talking it up enough.

80 X Q. Is it not an advantage, in your opinion, to a comparatively new thread to resemble closely an old and well-established brand? I mean would it not help its sale.

A. Not necessarily.

81 X Q. Don't you think you could sell Merrick's for Coats' if you tried?

988 A. I could sell any thread for Coats' if I wanted to deceive people, until they came to look at it, when they would become aware that I was deceiving them.

82 X Q. And as Merrick's bears the closest resemblance to Coats', as you have said, it would be easier to deceive people with Merrick's than with any other spools, would it not?

(Objected to for the reason that the witness has not so said, the language, "the closest resemblance," being ambiguous.

The attention of the court is called by complainants' counsel to the leading character of the above objection.)

A. When I spoke about deceiving people in selling them thread I could wrap up a spool of thread without showing it to the lady and she would be deceived then only until she opened her package and looked at it, when she could detect one—when she could see that she was deceived in one as well as in another, the names being on the label.

83 X Q. Suppose she did not for some reason take the trouble to read the names, would she not be more apt to take Merrick's for Coats' than any other thread for Coats'?

A. Well, I think if she was at all familiar with the thread she couldn't be deceived in it.

84 X Q. But if she was not familiar with it would she not be more likely to be deceived by Merrick's than any other?

A. If she was not familiar with the thread she would naturally look at the label to see what she was getting.

85 X Q. The case I have supposed was where she did not read the label; would she not then be more apt to be deceived by Merrick's than any other?

(Defendants' counsel requests complainants' counsel to put all his conditions in one question so that the witness may know just what he is asked to reply to.)

989 A. If she didn't look at the label she would naturally have confidence in me and think I gave her the right thing; take my word for it.

86 X Q. How did you happen to see Mr. Root on Tuesday, Feb. 28?

A. Mr. Root when in the city comes to see me every Tuesday; that's his day on the North Side.

87 X Q. How many times has he seen you and you him since January 13, 1888?

A. Well, Mr. Root was out of the city for awhile; I think about three or four times; I couldn't say positively which.

88 X Q. When did you first learn that he had given evidence in this case in New York?

A. I learned it on the 13th of January, 1888.

89 X Q. When did you first speak with Mr. Root at all in regard to the evidence he gave in New York?

A. The first time I saw him, which was some time in February; the exact date I cannot tell.

90 X Q. When next did you speak with him about his evidence?

A. Tuesday, this week—that is, February 28th.

91 X Q. What was said on the subject the first time you talked about it?

A. I cannot remember the exact words, but I think I said, "Rooty, I am afraid you have got yourself into a scrape;" words to that effect; then I asked him how he came to testify to that effect; he then told me what he told me afterwards again, that he had not given positive evidence, he being under the impression that it was I who had made certain remarks to him. Well, I think that covers it all; we had other conversation, but I cannot remember it all; that is a digest of it; he also told me last Tuesday that he was subpœnaed.

92 X Q. Did he not tell you that somebody said what he had testified was said by you in regard to selling Coats' for Mer-
990 rick's, and similarity between the two spools, and that he thought it was you when he gave his testimony, or words to that effect?

(Question objected to by counsel for defendants as an attempt to take a third set of *prima facie* proofs after having closed the first set voluntarily and the second set under order of court.)

A. Well, according to the previous question there, he told me that he was under the impression; that's the way he got out of it.

93 X Q. He told you that somebody had said what he testified to as being said by you and that he then thought it was you that said it. Did he not state that in substance in one of the two conversations with him you have referred to?

A. He never said that somebody had said what he testified to; he said it himself, but not as positive evidence.

94 X Q. Did he not tell you that some one had made to him the statements that he testified was made by you?

A. No, sir.

95 X Q. Did he not tell you that when he testified he thought you made those statements to him?

A. Yes, sir.

96 X Q. And that they were made to him by somebody. Did he not tell you that?

(Same objection, and further objected to as already answered.)

A. No, sir.

97 X Q. When did you first hear you were to testify in this case?

A. January 13th.

98 X Q. How often since then have you seen any agent or representative of the Merrick Thread Company?

A. Once or twice since.

99 X Q. Are you here under subpœna?

A. No, sir.

991 And being further examined by Mr. WITTER, he says:

100 R. D. Q. Is it your understanding that the Willimantic, Coats, and the two Clarks adhere to the same price for their thread and that they have some sort of a combination or understanding to that end?

(Objected to as incompetent and immaterial and not called for by former examination.)

A. Yes, sir.

101 R. D. Q. And the Mr. Root we have spoken of is the agent or is employed in the office in this city of the Willimantic Company, is he not?

(Objected to as immaterial and not called out by cross-examination.)

A. Yes, sir.

102 R. D. Q. For how long have you sold the Willimantic thread?

A. About two years.

103 R. D. Q. And you still sell it?

A. Yes.

O. C. FISCHER.

Subscribed and sworn to before me this 1st day of March, A. D. 1888.

[L. S.] HENRY W. PROUTY,
Notary Public.

Examination adjourned until 10.30 o'clock to-morrow morning.

PALMER HOUSE,
CHICAGO, ILLINOIS, *March* 2, 1888—10.30 a. m.

Parties met pursuant to adjournment.

Present: Counsel as before.

JESSE T. SEELY, a witness of lawful age, produced on the
992 part of the defendants, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by W. C. WITTER, Esq., counsel for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Jesse T. Seely; 47 years old; reside at Lake City, Minnesota;

I am engaged in selling merchandise, dry goods, notions, and groceries; also clothing.

2 Q. Of what firm are you a member?

A. Seely & Buck.

3 Q. Is there any other person by the name of Seely in your firm or employ?

A. No, sir.

4 Q. How long have you been in this business at Lake City, Minn.?

A. Over twelve years; thirteen years in June.

5 Q. Has it been a part of your business to sell spool threads at retail?

A. Yes, sir.

6 Q. What ones?

A. We used to sell Coats'; we have sold Kerr's.

7 Q. What are you now selling?

A. We sell Merrick's, and we have some Coats' on hand in coarse numbers.

8 Q. Do you know the firm of C. F. Young & Bro., of Lake City, Minn., of which Chas. Koch is a partner?

A. Yes, sir.

9 Q. What spool thread have they sold for some years back?

A. Coats'.

10 Q. State what the practice of the other retail dealers there has been as to buying Coats' thread of C. F. Young & Bro. and whether they have recently ceased more and more to do so.

(Objected to as immaterial.)

993 A. We have bought Coats' cotton of C. F. Young & Bro., and I understand others have done so, too.

11 Q. Whom do you mean by "others"? Name them.

(Same objection.)

A. M. O. Kemp, Raymond Hanisch.

12 Q. State whether, in your opinion, it has become difficult, if not impossible, for C. F. Young & Bro. to sell 2,000 doz. of Coats' thread per year and so save the 9 per cent. discount on that amount of thread.

(Objected to as incompetent and immaterial.)

A. My opinion is they couldn't hardly do it.

13 Q. What thread do M. O. Kemp and Raymond Hanisch now sell instead of selling Coats'?

(Objected to as immaterial.)

A. Merrick's.

14 Q. Isn't it true of Anderson Bros. also that they sold Coats' formerly, buying it of C. F. Young & Bro., and that they now sell Merrick's?

(Objected to as immaterial and leading.)

A. I think they did and do—that is, that they bought Coats' and sell Merrick's now.

15 Q. Did you ever sell Merrick's thread when Coats' was asked for, leaving the customer to suppose that he had received Coats'?

A. No, sir.

16 Q. It appears by the testimony for complainants, of Charles Koch, Henry Young, and G. Ford Carpenter, that at the instance of complainants or their agents, Auchincloss Bros., of New York city, C. F. Young & Bro. sent out boys and youths from 12 years old and upwards along early in December last to endeavor, while asking
994 for Coats' thread at your place of business and of other retail dealers in Lake City, to obtain Merrick's. Were you aware of this proceeding at the time or have you from various sources learned of it since that time?

(Objected to as — incomplete statement of the testimony referred to.)

A. I have learned of it since.

17 Q. State whether you have taken pains to inquire of your partner and among your clerks whether any one of them has sold Merrick's thread when Coats' was asked for, leaving the buyer to believe that Coats had been sold to him or her.

(Objected to as incompetent and calling for hearsay.)

A. I have asked them that question, and they said they had never sold Coats' cotton and said it was Merrick's.

(Same objection to answer.)

18 Q. Or left them to the mistake of supposing Coats' had been received? Did you learn that either of them had ever done that?

(Same objection.)

A. No, sir.

19 Q. Give the names, so far as you have become acquainted with them, of the boys that were sent about for this purpose.

(Same objection.)

A. G. Ford Carpenter and a younger Carpenter, I forget his name, a brother of his.

20 Q. Is there another one whose name you do not at present recall?

(Same objection.)

A. Yes, sir.

21 Q. State whether the time when these boys were sent
995 about on this errand, assuming that it was between the first of December and Christmas time, is or is not your busiest time.

(Objected to as immaterial.)

A. It is our busiest time. Now I remember that other man's name.

22 Q. What is his name and about how old is he?

(Objected to as incompetent.)

A. Will. Gardner. Don't know his age.

23 Q. He is a youth, is he not?

A. Yes, sir.

24 Q. When people ask you for Coats' thread and you find you haven't got it what do you do or say?

(Objected to as immaterial.)

A. We tell them we have Merrick's cotton.

25 Q. What, if anything, do you say about their returning it if they don't like it?

(Same objection.)

A. To return the cotton and get their money back.

26 Q. If you remember any instances of the Merrick's being returned under such circumstances relate them.

(Same objection.)

A. Our young lady told me that she gave the money back in one case.

(Answer objected to as hearsay.)

27 Q. State the circumstances; whether any of the cotton had been used or not from the spool.

(Same objection.)

A. I don't know that any had been used from that; not that I know of from that returned to the lady.

996 28 Q. Do you recollect an incident connected with a German returning thread? If you do, relate it and state the circumstances.

(Objected to as immaterial and leading.)

A. He returned a No. 40 spool of Merrick's thread. I found it hadn't been used. He took in its place a coarse spool of Coats' cotton.

29 Q. You say I found it hadn't been used. Had any of it been used?

(Objected to as immaterial.)

A. No, sir.

30 Q. What, if anything, did he say about his wife not wanting that make of thread?

(Same objection.)

A. He said she either did not like it or could not use it.

31 Q. So far as you know, is Merrick's thread sold at retail for less than 5 cents a spool?

A. We sell single spools for 5 cents; 50 cents a dozen.

32 Q. Is Merrick's thread sold, so far as you know, for less than 5 cents a single spool?

A. No, sir.

33 Q. Is Coats'?

A. It is sold in Chicago for 4 cents a spool.

34 Q. Where?

A. At the Bee Hive.

35 Q. What other threads are sold there at 4 cents a single spool that you know?

A. Clark's.

36 Q. Do you mean both Clark's "O. N. T." and Clark's "Mile-end"?

A. I can't tell which one it is.

37 Q. Isn't it both?

A. I can't tell.

38 Q. Will you please to go over there and see and bring back word?

A. I object to going over.

997 39 Q. For how long did you learn that Coats' and Clark's thread have been sold there for 4 cents a spool?

(Objected — as immaterial and calling for hearsay.)

A. They told me two years.

40 Q. Was there any sign or advertisement up in the store touching Coats' thread in this regard; if so, what was it in substance?

(Objected to as immaterial.)

A. Coats' spool cotton, 4 cents.

41 Q. Did they have Merrick's on sale at the Bee Hive?

(Same objection.)

A. No, sir.

Cross-examined by SAMUEL R. BETTS, of counsel for complainants:

42 X Q. When did you first begin to sell Merrick's thread?

A. I think it was in November, 1887.

43 X Q. How did you happen to begin selling it?

A. We bought of the agent when he came to Lake City.

44 X Q. Who was the agent?

A. I don't remember his name now, sir.

45 X Q. Have you bought any more since that first time?

A. Yes, sir.

46 X Q. From whom?

A. From same agent.

47 X Q. Is his name Phillips?

A. Yes, sir.

48 X Q. What inducements did he offer you to purchase and introduce Merrick's thread?

A. A better discount than we could get off Coats'.

49 X Q. He has sold you Merrick's for less than you could buy Coats' for; is that it?

998 A. Yes, sir.

50 X Q. And you sell Merrick's by the spool at the same price as Coats', and thus make a larger profit by selling Merrick's; is that so?

A. We do if we sell it at just 5 cents a spool.

51 X Q. And you do sell it at 5 cents a spool, don't you?

A. We sell it at 5 cents a single spool, 50 cents a dozen.

52 X Q. You can't swear that C. F. Young & Bro. cannot sell 2,000 dozen of Coats' thread in a year, can you?

A. I don't think he could retail it.

53 X Q. Don't you know that they have sold that amount during — past year?

A. I've heard it said they had done it.

54 X Q. Don't you believe they have?

Defendants' counsel states his willingness to admit that they have sold as much as that and informs complainants' counsel that the testimony of a member of that firm, on his behalf, states that they have and that they don't believe they can do it at present, and that they had to resort to the so-called fraud advertisement of December, 1887, aided by Auchincloss Bros., in order to succeed in doing so during that year.

Complainants' counsel, with reference to the above objection, first denies that it is a correct statement of any testimony for complainant-; second, objects to it as calculated to prompt the witness, and, third, asks defendants' counsel when he proposes to give testimony to be sworn, in order that complainants' counsel may have the pleasure of cross-examining him.

A. I suppose they have.

55 X Q. What inducements besides lower price did Merrick's agent, Mr. Phillips, offer you to introduce the Merrick's thread?

999 A. I don't know of anything.

56 X Q. Did he not tell you that you could sell it instead of Coats' and make a larger profit?

A. No, sir.

57 X Q. Do you find you can sell it instead of Coats' and make a larger profit?

A. We sell it.

58 X Q. How long since you have bought any Coats thread?

A. I don't think we have bought any in three months.

59 X Q. Who was that last bought from?

A. C. F. Young & Bro.

60 X Q. Last December you had both Coats' and Merrick's spools in stock, did you not?

A. Yes, sir.

61 X Q. And were selling both Coats' and Merrick's, were you not?

A. Now, if you will let me explain one minute about that thing. We had coarse numbers of Coats' and sold. We sold Merrick's, too.

62 X Q. Are you selling Merrick's since you put it in stock to the same customers to whom you formerly sold Coats' before you got Merrick's?

A. Yes, sir.

63 X Q. Are not a great many of your sales by the single spool or two or three spools at a time?

A. We sell it every way; 25 cents' worth is mostly sold.

64 X Q Has not Coats' thread been for a number of years past the leading brand and most asked for at Lake City, in your store?

A. Yes, sir.

65 X Q. Since you have put in Merrick's what has the proportion of sales been as between Merrick's and Coats', say for the last three months—December, January, February?

A. We have sold the most of Merrick's

66 X Q. When customers who had formerly bought Coats' come in do you try to sell them Merrick's?

A. Yes, sir.

1000 67 X Q. Have you instructed your clerks to do the same?

A. The goods is there to sell. They sell it.

68 X Q. Have you not given instructions to try and sell Merrick's in preference to Coats'?

A. Our instructions are that if they ask for Coats' not to sell Merrick's with the understanding that it is Coats'.

69 X Q. What has made it necessary for you to give such instructions?

A. Want to introduce the Merrick's cotton—want to sell the Merrick's cotton.

70 X Q. What has made it necessary for you to give instructions not to sell Merrick's for Coats'?

A. We have quit selling Coats' cotton and have gone to selling Merrick's.

71 X Q. That does not answer my question. Please hear it read again.

A. We haven't got Coats' to sell in the every-day numbers; the medium numbers.

72 X Q. Why did you give instructions not to sell Merrick's for Coats'?

A. Our instructions are to sell Merrick's cotton if they call for it and Coats' cotton for Coats' if we have the numbers.

Examination adjourned until 2 o'clock p. m.

Examination resumed pursuant to adjournment at 2.20 o'clock.

73 X Q. Have you heard anything said by your customers as to Merrick's spools looking like Coats'?

A. No, sir.

74 X Q. Don't you think they do look like them?

Defendants' counsel says that he has sought to shorten the exam-

ination of this witness and has therefore put no question to
1001 him which warrants the above question as cross-examination and he therefore notifies complainants' counsel that he must consider the witness as his own on this point, and the objection of X Q. 92 of witness Fisher is here repeated.

Complainants' counsel states that he considers this line of cross-examination entirely justified by questions asked in the direct which relate to a comparison of sales between Coats' and Merrick's.

A. The spools, I think, do somewhat, but the labels are different.

75 X Q. In what respect do you think Merrick's spools are like Coats'?

(Same statement and objection by defendants' counsel.)

A. There's numbers on the end.

76 X Q. If the paper labels on the upper ends of both a Merrick and Coats spool of the same number, say 40, for example, happen both to be removed by some accident, do you think an ordinary customer could tell the Merrick's spool from the Coats' by ordinary examination?

(Same objection.)

Counsel for defendants asks complainants' counsel if he limits the question to one end of the spool only or includes both ends and wishes to be understood that the labels on both ends are to be removed, or is the assumed customer to be prohibited from looking at the other end of the spool. Defendants' counsel asks complainants' counsel to endeavor to make his question very clear; otherwise the witness may answer under a mistaken notion of the scope of the question.

Complainants' counsel calls the attention of the court to the above objection as leading.

1002 A. They might not.

77 X Q. Then the printed name on the label is what distinguishes Coats' from Merrick's, is it?

(Same objection.)

A. That's what I think.

78 X Q. And if that printed name is not noticed or read there is a very great similarity between the upper or embossed spool heads of Coats' and Merrick's, is there not?

(Same objection.)

A. They look alike; yes, sir.

79 X Q. Does not that similarity of Coats' spool heads to Merrick's, in your opinion, help the introduction of Merrick's thread at Lake City, where the sales have heretofore been mainly Coats'?

(Same objection.)

A. I don't think so, if the paper label is on the different threads.

80 X Q. How do you find it with your customers who formerly bought Coats'; are you able to sell them Merrick's instead of it?

A. Yes, sir.

81 X Q. Do you not make a large number of your sales to children who are sent in to buy from one to five spools of cotton?

A. No, sir.

82 X Q. Do you not make a good many sales to such children?

A. No, sir.

83 X Q. Don't your firm sell any spool cotton to children who are sent in to buy it?

A. I suppose we do.

84 X Q. You do so pretty much every day, don't you?

A. I suppose they come sometimes.

85 X Q. Do you know G. Ford Carpenter, of Lake City?

A. Yes, sir.

1003 86 X Q. Do you remember his buying any spool thread at your store last December?

A. I heard he bought two spools there.

87 X Q. He has testified under oath that he did; you do not mean to deny this, do you?

A. He might have bought them.

88 X Q. You don't remember the circumstance, then?

A. He came in and asked me for muslin suitable for his printing press; I told him I didn't know what he wanted; gave him strong unbleached muslin; he claims he bought two spools of cotton of me; I don't remember selling it to him, and the reason of remembering the muslin was we had a talk about it.

89 X Q. Then you don't remember the circumstance of selling him spool cotton?

A. No, sir; I do not; I don't say I didn't sell it to him, but I don't remember it.

90 X Q. Nor what kind of cotton he asked for?

A. No, sir.

91 X Q. Nor what kind you gave him, if you did sell him any, do you?

A. Don't remember anything about it.

92 X Q. When a customer has come in and asked for Coats' thread have they never been supplied with Merrick's?

A. We might have told them we had Merrick's; if we gave them Merrick's we told them what it was.

93 X Q. Then you have supplied customers asking for Coats' with Merrick's, but claim that the difference has always been explained to the customers; is that it?

A. That's what I think.

94 X Q. You do not sell all the thread that is sold in your store, do you?

A. No, sir.

95 X Q. How many others besides yourself were selling thread there during last December?

A. Three.

1004 96 X Q. Why was the number 40 spool of Merrick's thread returned by the German, as you state in your direct testimony?

A. He said he didn't like it.

97 X Q. Do you know his name?

A. Well, I can't think now what his name is.

98 X Q. Had he or his wife been in the habit of buying Coats' thread from you?

A. Not as I know of.

99 X Q. Had they been customers of yours?

A. Oh, they traded in our store; not particularly our customers.

100 X Q. Did the German say, when he returned the Merrick spool, that he had received it instead of Coats', or anything to that effect?

A. I don't think he did; I didn't hear all the conversation.

101 X Q. When did this occur, his return of this number 40 Merrick's spool?

A. In February, about two weeks ago.

102 X Q. At that time had you any Coats' No. 40 in stock?

A. No, sir.

103 X Q. Did you hear him say why he returned it?

A. He said he'd tried the cotton before and it wouldn't run on his wife's machine.

104 X Q. And he took a spool of Coats' in place of the Merrick's he returned, did he?

A. Yes, sir; a coarser number.

105 X Q. Do you know whether he had received the Merrick's himself originally, or who received it, the one he returned?

A. I think his wife received it.

106 X Q. Do you know what the German's wife asked for when she got the number 40 Merrick's spool?

A. No, sir.

107 X Q. You speak of Coats' thread being sold at the "Bee Hive" store, in Chicago, at four cents the single spool; do they not sell all their thread there at four cents a single spool?

1005 A. I've bought Coats' and Clark's Mile-end at four cents a spool.

108 X Q. At what price do they sell their other thread a spool?

A. I didn't buy any other.

109 X Q. Does not a retailer who sells Coats' thread at four cents a spool lose money?

A. If he bought it the same way we usually buy he'd lose money.

110 X Q. The "Bee Hive" is the same sort of a retail concern as your store, as far as selling spool thread goes, is it not?

A. I suppose so.

111 X Q. What can you buy a dozen spools of Coats' thread for at the "Bee Hive"?

A. They told me 48 cents.

112 X Q. Will they sell you a dozen spools of Coats' thread for 48 cents without your buying something else with it?

A. The girl offered to sell me a dozen for 48 cents.

113 X Q. Did you buy it?

A. No, sir.

114 X Q. What is the object of a retailer selling Coats' or Clark's thread at 4 cents a spool and losing money on every sale?

(The question is objected to for the reason that it assumes improperly that money is lost in such a case, whereas money is made by that sale. Complainants' counsel is referred to terms of sale of Coats' thread in large quantities as contained in the testimony, by which he will see, after a very simple arithmetical calculation, that there is a profit to the retailer on the sale of this thread at 4 cents a spool.)

A. I can't say he does lose money on it.

And, being further examined, the witness says:

115 R. D. Q. Have you with you the spools you purchased at the "Bee Hive" this morning?

1006 A. Yes.

116 R. D. Q. Look at them and state whose they are.

A. Clark's O. N. T., Clark's Mile-end, Coats'.

117 R. D. Q. Merrick's thread is now the leading thread in Lake City, is it not, and is sold by more firms than Coats'?

A. I tell you one thing: It is sold by more firms. I won't say about the leading thread.

De bene esse:

118 X Q. Did you ever know of any one being deceived into taking Merrick's thread, supposing it was Coats'?

A. I don't remember of anybody just now.

119 X Q. Question repeated.

A. No, sir.

And being further cross-examined:

120 X Q. If a person of good reputation to your knowledge testified under oath that he had been so deceived, would you believe him?

A. I think I would.

121 X Q. When did you first learn you were to testify in this case?

A. Mr. Hopkins wrote me from New York two or three weeks ago, I think.

122 X Q. Have you that letter with you, or where is it?

A. No, sir; it's home.

123 X Q. How did you happen to come down to Chicago from Lake City to testify?

A. He wrote me about a week ago to be here to-day at 10 o'clock; to be here Friday.

124 X Q. Did he offer to pay your expenses?

A. He said that everything would be right, or something like that; make it right.

125 X Q. Make it all right with you for your expenses and time and trouble in coming down here. Was that it?

A. I suppose so. It wasn't as full as that.

1007 126 X Q. That was the way you understood it, was it?

A. Yes, sir.

Being further examined, he says:

127 R. D. Q. If a person of good reputation, to your knowledge, testified under oath that he had been deceived into taking Clark's Mile-end, supposing it was Coats', you would believe him, would you not?

A. I think I would.

JESSE T. SEELY.

Subscribed and sworn to before me this 2d day of March, A. D. 1888.

HENRY W. PROUTY,
Notary Public.

PIERRE V. ROOT, a witness of lawful age, produced on the part of the defendants, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by W. C. WITTER, Esq., counsel for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Pierre V. Root; 28 years old; 228 South Hoyne street, Chicago; salesman for the Willimantic Linen Company.

2 Q. Are you employed in the agency of that company in this city?

A. I am.

3 Q. What are your principal duties in connection with the Willimantic Linen Company?

A. To sell thread in Chicago.

4 Q. Do you mean the thread known as Willimantic 200-yard six-cord thread, principally?

A. Yes, sir.

1008 5 Q. Are you the same P. V. Root who gave testimony for complainants on Jan. 12, 1888, in New York city?

A. I am.

6 Q. Have you been subpœnaed to give testimony in this case on the part of the defendants?

A. I have.

7 Q. After you returned from New York on that occasion did you learn from Mrs. Thomas W. Partridge that she had given a statement to Mr. E. A. Still regarding that part of your testimony relating to her?

(Objected to as incompetent.)

A. I did.

8 Q. E. A. Still is agent for The Merrick Thread Company, defendant, is he not?

A. I understand that he is.

9 Q. After you had talked with Mrs. Partridge what conclusion did you come to with reference to your testimony concerning her?

A. I concluded that I had been mistaken in reference to that incident.

10 Q. What effort did you then make to repair the mistake?

A. I went to Mr. Still and made a statement to that effect—that I had been mistaken in reference to Mrs. Partridge.

11 Q. And on that occasion did you sign and ask Mr. Still to send to me the letter which I now hand to you?

A. I did.

12 Q. And you subsequently, in the city of Chicago, to wit, on the 31st day of January, 1888, signed and swore to the affidavit I now hand you, did you not?

A. I did.

13 Q. And you now wish to be understood as affirming the contents of the above-mentioned letter and affidavit, do you?

(Objected to as leading.)

1009 A. I do.

14 Q. This affidavit was prepared from your statements by myself in the presence of Mr. E. A. Still, in the city of Chicago, was it not?

A. It was.

Defendants' counsel offers the said letter and the same affidavit in evidence, and they are marked "Defendants' Exhibit No. 63, Root Letter of Jan. 20, 1888, and Defendants' Exhibit No. 64, Root Affidavit."

(Complainants' counsel objects to the two exhibits just offered as incompetent and not the best evidence and as in contradiction of the testimony of this witness heretofore given under oath.)

15 Q. Will you now please read first the letter and then the affidavit, making them a part of this record?

(Objected to as incompetent and immaterial.)

A. I will.

16 Q. Instead of taking time now to read them while they are being copied into the record, will you please have them read to you by the magistrate and subsequently copied upon the record as your answer to this question?

(Objected to as incompetent, immaterial, and complainants' counsel insists that whatever may be intended as direct examination of this witness shall be completed and put in the record before he proceeds to cross-examine.)

A. Yes.

The examiner is requested now to read aloud first the letter above named and then the affidavit. The examiner reads the two documents.

1010 The magistrate is now requested to page this letter and affidavit, consecutively with this evidence, instead of taking time to copy it out.

(Complainants' counsel objects to this method of bringing the letter and affidavit into the testimony as entirely improper, especially in view of the way in which said letter and affidavit have been procured, and insists on the statute being observed, which provides that testimony taken *de bene esse* shall be taken down by the officer in his own handwriting so far as this letter and affidavit are concerned, and will move to strike them from the record if not so taken down.)

Defendants' counsel says that, having now done all in his power to avoid the needless delay made necessary by complainants' counsel's objections, he requests the magistrate to proceed to copy the said letter and affidavit upon the record in his own writing in response to question 15.

(Complainants' counsel objects to the introduction of said letter and affidavit in this manner and having them copied into the record at the request of defendants' counsel, on the ground that such copying does not and cannot make such letter and affidavit testimony, and that the witness is here present and can be examined as to any questions of fact, and will move to have said letter and affidavit if so copied stricken from the record.)

1011 The examiner copies the letter and record as follows:

DEFENDANTS' EXHIBIT NO. 62.

Root Letter of Jan. 20, 1888. *H. W. P., Notary.*

"Merrick Thread Company, western agency, 205 Fifth avenue;
E. A. Still, manager.

CHICAGO, ILL., *Jan.* 20, 1888.

Mr. Witter, New York city.

DEAR SIR: Since I returned to Chicago I have talked matters over with Mrs. T. W. Partridge concerning the conversation I had with her about which I testified when I was last East in the J. & P. Coats *versus* Merrick Thread Co.'s lawsuit, and I find that I was mistaken, and I wish to retract what I testified to so far as it pertains to her being in any way deceived in the matter referred to, and you will oblige me by writing such a document for me to sign as will cover these points and I will sign and return the same at once.

Yours, etc., P. V. ROOT."

1012 DEFENDANTS' EXHIBIT No. 63.

Root Affidavit. H. W. P., Notary.

COATS *et al.*
v.
THE MERRICK THREAD CO. *et al.*

STATE OF ILLINOIS, }
Cook County, } *ss:*

United States Circuit Court, Southern District of New York.

"P. V. Root, being duly sworn, deposes and says as follows: I am the P. V. Root who gave testimony for the complainants in the above case on January 12, 1888, in the city of New York. Before going upon the witness stand I told Samuel R. Betts that I could not swear positively to any instance of deception or to my having heard of any instance of deception. I told him that I could not depend upon my memory so as to state anything positive, and this especially as to the circumstances connected with Mrs. Thomas W. Partridge's purchase of thread. I tried to escape giving testimony, but I finally consented to give the evidence, insisting all the time that I could not be positive about this deception business. Under the questions put to me by Mr. Betts I gave evidence more positive than I meant to or than I ought to. Since returning to Chicago I have talked the matter over with Mrs. T. W. Partridge concerning the conversation I had with her, about which I testified as above stated, and I find that I was mistaken, and I wish to retract what I testified to so far as it pertains to her being in
1013 any way deceived in the matter referred to—that is to say, she was not deceived into taking Merrick's thread, thinking it was Coats', nor did she, on inquiring for Coats', receive Merrick's, not noticing it was Merrick's, or afterwards discover it was Merrick's.

"The similarity between Coats' and Merrick's manufacture that I referred to in my testimony was the fact that they both have the number indicating the size of the thread stamped in the wood, making them look more alike than the other black and gold labeled spools look like Coats'. I understood that the Coats people had a patent for the use of those numbers on the spool, and was informed that the Merrick people were infringing on that patent. That was why I thought they looked similar. Black and gold circular labels with the name of thread—that is, the maker's name, the number of the thread, the length of the thread, and the quality—that is to say, best six-cord all disposed in circular lines—have been used on six-cord thread by all principal makers ever since I have been in the business, so that such a label has become a badge of six-cord thread.

"I wish to be understood also as no more positive about the Fischer incident of my testimony than about the Partridge incident. I ar-

rived at the conclusions above stated and swear to them without any other inducement whatever than my desire to do right, and I called upon Mr. E. A. Still, agent of the Merrick Thread Company in Chicago, for that purpose on January 20th, 1888, and at his office wrote to Mr. Witter the letter hereto annexed, or rather signed it.

"I did not attempt to be positive in my talk with Mr. Betts before the examination, and told him several times I could not be positive either about the persons or incidents, and I did not intend to be positive in my testimony, nor did I understand that my testimony was positive. I relied upon nothing but my bare memory, and so informed Mr. Betts.

1014 "I have read over this affidavit myself and find it to be correct in every particular.

"(Signed) P. V. ROOT."

Subscribed and sworn to before me this 31st day of Jan-
[SEAL.] uary, 1888, at Chicago, in the county of Cook and State of Illinois.

L. B. CHAPMAN,
Notary Public.

Examination adjourned to 10 o'clock Saturday morning.

PALMER HOUSE,
CHICAGO, ILL., *March* 3, 1888—10 a. m.

Examination resumed pursuant to adjournment.

The witness, P. V. ROOT, being further examined by Mr. WITTER, says:

17 Q. How came it about that you found you were mistaken in what you testified to in New York regarding the Partridge incident?

A. When I returned home from New York I learned that Mrs. Partridge had made a statement and when I came to talk with her about it I found I was mistaken in regard to the incident.

18 Q. In what particular did you learn from her that you were mistaken?

A. She informed me that she had used Merrick's thread before and had never been deceived by any one.

19 Q. How long before had she used Merrick's thread?

A. Five or six years before in Brooklyn, N. Y., and also when she first came to Chicago.

20 Q. How long ago is it that she first came to Chicago?

A. I think it is over four years.

1015 21 Q. Did Mrs. Partridge state to you in substance that she had never received Merrick's thread on asking for Coats'?

(Objected to as leading.)

A. I understood her so.

22 Q. And that she was never deceived in taking Merrick's for Coats'?

(Same objection.)

A. That is what I understood her to say.

23 Q. And that she had never taken one for the other by mistake?

(Same objection.)

A. Yes, sir.

24 Q. And that you must have been mistaken in your recollection?

(Same objection.)

A. Yes, sir; in regard to her being the party.

25 Q. You and Mr. Thomas W. Partridge, husband of Mrs. Partridge, were school-boys together in the East, and have always been intimate friends. Is that so?

A. Yes, sir.

26 Q. How long have you boarded in their family?

A. I think about two years and a half.

27 Q. What thread has Mrs. Partridge used during that period?

A. Principally Willimantic thread and Merrick's thread mostly on bobbins.

28 Q. Do you mean bobbins for sewing machines?

A. I do.

29 Q. Is Mrs. Partridge in such a condition of health as that her testimony cannot with safety to herself be taken?

A. She is decidedly.

30 Q. Is she daily awaiting offspring?

A. Yes, sir.

1016 31 Q. And has she requested by herself and through her husband not to be examined as a witness from fear of misfortune?

A. Yes, sir; she has.

32 Q. Has she made an affidavit embodying the substance of her talk with you touching your mistaken evidence?

A. She has.

33 Q. Look at the affidavit now produced and state whether you recognize the affidavit and her signature.

(Objected to as incompetent.)

A. I do.

34 Q. So far as that affidavit concerns itself with the incident of your New York testimony, state whether the affidavit states correctly the substance of Mrs. Partridge's talk with you on your return from New York.

(Objected to as incompetent and immaterial.)

A. It does as nearly as I can recollect it.

(Defendants' counsel offers the said affidavit in evidence and it is marked Defendants' Exhibit No. 65, Partridge Affidavit, H W. P., notary.)

(Objected to as incompetent and immaterial and not the best evidence and an attempt to introduce evidence of Mrs. T. W. Partridge without calling her as a witness and permitting her to be cross-examined.)

35 Q. State something about Mrs. Partridge's condition last night and to-day.

A. She was quite sick last night.

36 Q. With attending physicians?

A. A physician was called; yes, sir.

37 Q. In whose handwriting is the letter marked Defendants' Exhibit No. 62 of January 20, 1888?

A. Mr. E. H. Still's.

1017 38 Q. Who dictated the substance of it?

A. I did.

39 Q. Who dictated the substance of the affidavit Defendants' Exhibit No. 63, Root Affidavit?

A. I did.

40 Q. Have you stated to me this morning that you wished to make the two following corrections in that affidavit:

1. To the effect that the word "insisting" and up to the next period, to wit, the words "insisting all the time that I could not be positive about this deception business," is a stronger expression of your understanding than you desired it to be.

2. That you intended to say and wished to be understood as saying on the 2d page of said affidavit that it is not upon all six-cord thread but upon six-cord thread wound upon 200-yard spools that all the principal makers have used for the time mentioned black and gold circular labels with the name, number, length, and quality disposed in circular lines upon them.

And have I correctly expressed the corrections which you desire made?

(Objected to as leading.)

A. I so stated to Mr. Witter and he has correctly expressed it.

41 Q. Do you desire to make any other corrections in that affidavit?

A. I guess that is all.

42 Q. And do you reaffirm the statements therein made the same as if you were separately interrogated as to each one of them?

(Objected to as incompetent and immaterial.)

A. I do.

43 Q. Did you, before going upon the witness stand in New York, tell Samuel R. Betts in substance that you could not swear positively to any instance of deception or to your having heard of any instance of deception?

1018 A. I told Mr. Betts that I could not be positive about these two instances of deception and did not understand my evidence as being positive evidence.

44 Q. What was the similarity between the Coats' and Merrick's thread that you referred to in your New York testimony?

A. In the raised numbers around the edge of the spool.

45 Q. What claim had you understood that the Coats people had, if any, to the use of such numbers?

A. I understood they had a patent on that style of spool.

46 Q. And had you understood that the Merrick's people were infringing on that patent?

(Objected to as leading.)

A. I so understood.

47 Q. State what kind of a label since you have been acquainted with the business has been used by the principal makers upon one end of their 200-yard six-cord thread.

A. Black and gold label, with the name printed in circular lines.

48 Q. What shape of label?

A. Round.

49 Q. What else has generally appeared upon the black and gold label besides the name?

A. The number and "best six-cord thread."

50 Q. State whether any influence of any kind has been brought to bear upon you or any inducements offered you to cause you to go to Mr. Still and make the statement you did to him or to write the letter to me or to make the affidavit, or whether you have done these acts of your own motion from a desire to put yourself right in your position between the parties and before the court.

A. There was no inducement offered me; my principal motive in going to Mr. Still was to relieve Mrs. Partridge from the
1019 necessity of her appearing on the witness stand, as she was in a critical condition, and to set myself right.

51 Q. Up to the time that you went to Mr. Still had you had any communication whatsoever with the defendants or their counsel or anybody connected with them?

A. None whatever.

52 Q. State whether Kerr's and Chadwick's six-cord 200-yard thread is sold in regular course of business as much below the price of Coats' and the other threads of the combination as Merrick's is.

A. I understand they are.

53 Q. Are you familiar with the advertisement of the Chadwick thread, stating as follows: "We object to monopolies and refuse to join the six-cord combination," or words to that effect?

A. I have seen it so advertised on their cards.

54 Q. O. C. Fischer, a witness for defendant-, has said in substance that he finds Chadwick's six-cord thread unsalable because customers think it is a basting thread—that is, a three-cord thread—because it does not have a black and gold label. Now, as a person familiar with the trade, state whether, in your opinion, the Chadwick thread is making headway or declining, and whether one of the obstacles that it meets with consists in its not having a black and gold label upon one end.

(Objected to as immaterial.)

A. I think that Chadwick's thread is declining in point of sale, but could not state positively whether the cause was in its not having black and gold label.

55 Q. The combination referred to by the Chadwicks is the well-known confederacy of the Coats', Clark's "O. N. T.," Clark's "Mile-end," and Willimantic concerns to prevent their six-cord 200-yard spool thread being sold at less than five cents a spool?

(Objected to as immaterial and leading.)

1020 A. I understand that that is the object of the combination.

56 Q. Who sent you down to Mr. Betts' office to give the testimony which you gave in New York?

A. Mr. T. M. Ives asked me to go down and give testimony.

57 Q. He is the general agent for the Willimantic thread concern, is he not?

A. Yes, sir.

The witness, being cross-examined by Mr. SAMUEL R. BETTS, on behalf of complainant-, says:

58 X Q. How did Mr. Ives happen to ask you to come to my office in New York in connection with this suit?

A. As near as I can remember, Mr. Ives spoke of his giving testimony in the case, and asked me to go down and testify what I knew in reference to the similarity of the two makes.

59 X Q. Was anything said in any conversation you had before giving your testimony on Jan. 12, 1888, by you while in New York on that occasion in regard to instances of persons being deceived and obtaining Merrick's thread instead of Coats'?

A. Yes, sir; I spoke of two such instances.

60 X Q. Which were those?

A. Mrs. Partridge and O. C. Fischer.

61 X Q. Did you mention those instances to any person before you came to my office on Jan. 12, 1888, to testify?

A. I don't recollect that I did. I spoke to Mr. Ives about them after giving testimony.

62 X Q. You had a short talk with me on Jan. 12, 1888, just before testifying in regard to what evidence you could give, did you not?

A. Yes, sir.

63 X Q. It was you that first mentioned the incident of Mrs. Partridge and of O. C. Fischer to me, was it not, and not I who asked you about them in the first instance?

A. I said I thought I recollected two such instances.

1021 64 X Q. I did not suggest the names or instances to you, did I?

A. No, sir. You asked me if I could recollect any cases of deception and I mentioned these two incidents.

65 X Q. You were not subpœnaed for complainant- on Jan. 12, 1888, were you?

A. No, sir.

66 X Q. You were not instructed by any one what testimony you should give, were you, other than by being questioned?

A. No, sir. I was only told what the issue of this suit was on.

67 X Q. You had not been to my office before the day you testified, had you, or seen any one from there in relation to this testimony?

A. No, sir.

68 X Q. When you gave that testimony on Jan. 12, 1888, did you not know that you were testifying under oath?

A. Yes, sir.

69 X Q. And you believed that testimony to be true when you gave it, did you not?

A. I thought it was correct, but was not positive.

70 X Q. You remembered hearing of instances of deception by Merrick's being given to those who asked for Coats', or hearing it said that Merrick's could be substituted for Coats' on account of the similarity in appearance of spools, and your best recollection at the time you testified was that Mrs. Partridge and O. C. Fischer were two persons whose names you could give in connection with such occurrences? Is that a fair statement?

(Objected to by defendants' counsel as an attempt to make out a third *prima facie* case of deception or liability to deception after having voluntarily closed the first *prima facie* proofs, as appears by the affidavit of Wahle, complainants' counsel's managing clerk, and elsewhere, and after having closed their second *prima facie* proofs by order of court.

1022 Complainants' counsel says that there is no statement on the record anywhere to the effect that complainants have closed proofs, *prima facie* or other, and refers the court to questions and answers 13 and 14 of Root's testimony of Jan. 12, 1888, and requests the magistrate to read them to the witness before asking the last question.)

A. Those were the only two parties that I could recollect, and I thought they were the parties because I knew them so well.

71 X Q. These were parties, then, that you had heard of being deceived by Merrick's spools for Coats'?

A. Those were the only two that I could recollect.

72 X Q. You mean the only two that you thought you could give the names of?

A. Yes, sir.

73 X Q. Can you now, having had the matter again recalled to you, recollect the names of any others?

A. No, sir; I cannot.

Examination adjourned to 1.30 o'clock p. m.

74 X Q. How soon after giving your testimony on January 12, 1888, did you leave New York and come to Chicago?

A. It was on the following Tuesday night, I think.

75 X Q. How soon after giving the testimony did you have any conversation with Mrs. Partridge about it?

A. The evening after I returned.

76 X Q. Did she mention the subject first or you?

A. I told her that I had been down to her husband's office before coming up to the house, and he had spoken of Mr. Still's being at the house to get Mrs. Partridge's testimony.

77 X Q. Mr. Still was at the house to get Mrs. Partridge's testimony on what day?

1023 A. I think the first time he called was the day before I got back.

78 X Q. Did he see Mrs. Partridge on that occasion?

A. Yes, sir.

79 X Q. And Mr. Partridge?

A. No, sir.

80 X Q. Did he question her in regard to your testimony or tell her what it was?

A. Yes, sir; he did question her in regard to it and wrote down what she said.

81 X Q. When did any representative of the Merrick Company first see you in regard to the testimony you had given in New York?

A. I called on Mr. Still the day after I had this conversation with Mrs. Partridge.

82 X Q. Did Mrs. Partridge request you to call on him?

A. No, sir; but she was very much worried about it, and I said I would go down and see Mr. Still and, if necessary, say that I was mistaken in regard to that part of my testimony relating to her?

83 X Q. Was she afraid she would be called as a witness?

A. She was afraid she might be called, and I thought that was the best way to get her out of it.

84 X Q. You had in consideration, I suppose, the delicate condition of her health?

A. Yes, sir: that was my reason.

85 X Q. Was it on your first visit to Mr. Still that the letter was written which is marked in evidence as Defendants' Exhibit Root Letter of Jan. 20, 1888?

A. Yes, sir.

86 X Q. In whose handwriting is that letter?

A. Mr. Still's.

87 X Q. Entirely?

A. With the exception of the signature, which is mine.

1024 88 X Q. Was anything said between you and Mr. Still in regard to not calling Mrs. Partridge as a witness if you would sign the letter or make an affidavit like that sworn to Jan. 31, 1888, Defendants' Exhibit Root Affidavit, or testify to the substance of that letter or what appears in that affidavit?

A. I volunteered to make that affidavit, and Mr. Still thought that with Mrs. Partridge's affidavit it would not be necessary to call her as a witness.

89 X Q. And told you so, did he?

A. He said so.

90 X Q. How did it happen that the letter of Jan. 20, 1888, was written by Mr. Still and was signed by you?

A. Mr. Still offered to write the letter at my dictation because, for one reason, I'm a remarkably poor writer and have a considerable nervous affection.

91 X Q. Are you not in the habit of writing letters frequently in your business and otherwise?

A. Yes, sir.

92 X Q. Every day, don't you?

A. Nearly every day.

93 X Q. Did you inform Mr. T. M. Ives, of New York, or the Willimantic Thread Company in regard to signing this letter of Jan. 20, 1888, or your affidavit of Jan. 31, 1888, or in regard to any doubt arising in your mind as to the correctness of your testimony?

A. No, sir. I told Mr. Bragdon, our manager in Chicago, what I had done in the matter.

94 X Q. When did you tell Mr. Bragdon about it?

A. When he returned from New York; I think either two or three weeks after the letter was written.

95 X Q. How long ago did he return from New York?

A. I don't know just how long ago; I think it was about three weeks ago—three to four.

96 X Q. Have you ever written or given information to
1025 any of Coats' agents or representatives or to me or their counsel in regard to any correction you desired to make in your New York testimony in this case?

A. No, sir.

97 X Q. Why not?

A. I didn't think of it.

98 X Q. Then you have not asked complainants or their representatives or counsel to allow you to make any correction in your testimony; is that so?

A. No, sir.

99 X Q. When next, after signing that letter written for you by Mr. Still, did you see him or any representative of Merrick Thread Co. in regard to your testimony?

A. It was two or three days afterwards.

100 X Q. Where was that, whom did you see, and what was said and done on this subject?

A. It was at Mr. Still's office, and Mr. Still said Mr. Witter would be on from New York in a day or two and I could have an affidavit drawn up to sign; that was about the conversation.

101 X Q. How did you happen to go to Mr. Still's office?

A. Mr. Still, when I was there on Jan. 20, said he would send this letter right on to Mr. Witter to prevent any action being taken in regard to subpœnaing Mrs. Partridge. He also said if I would stop in in a few days he would let me know what he heard from Mr. Witter.

102 X Q. When next did you see Mr. Still or any of Merrick's representatives in regard to your testimony?

A. I think it was when Mr. Witter got here to attend the testimony of complainants, which I believe — on or about Jan. 26.

103 X Q. What was done in regard to your testimony on that occasion?

A. The affidavit was drawn up and sworn to on Jan. 26, 1888, of which Defendants' Exhibit No. 63, Root Affidavit, is a typewritten copy, and was resworn to on Jan. 31, 1888.

1026 104 X Q. By whom was that affidavit of Jan 26, 1888, written out?

A. By Mr. Still, Mr. Witter, and myself.

105 X Q. Principally by Mr. Still and Mr. Witter, was it not; less than eleven lines by you?

(Defendants' counsel desires the examiner to note that the affidavit of Jan. 26th, 1888, was handed to complainants' counsel immediately after the 103 X Q. for such use as he desires to make of it; the examiner so notes.)

A. Principally by Mr. Still. Mr. Still wrote the first three pages, I wrote eleven lines, and Mr. Witter wrote the rest.

106 X Q. When next did you have an interview with representatives of the Merrick Thread Co. after signing that affidavit of Jan. 26, 1888?

A. The day I signed the second affidavit of Jan. 31, 1888.

107 X Q. Where was this affidavit signed, who was present, how did you happen to be there, and what was said in regard to your testimony?

A. It was signed in a notary public's office in the post-office building, I believe. Mr. Still was present. Mr. Still brought me there to sign the affidavit. I believe he said that he thought that was all that would be required.

108 X Q. Mention all the occasions since Jan. 31, 1888, on which you have seen any representative of defendants' firm in regard to your testimony, whom you saw, and what was said and done.

A. I think I have seen Mr. Still twice since. He came into the office and said I was going to be subpœnaed for to day; then he came in again and asked me if I would come Friday at 2 o'clock, Mar. 2d, instead of to-day. I saw Mr. Witter yesterday morning, Mar. 2d, about 9 o'clock. I don't remember having seen him between Jan. 26th and that time.

1027 109 X Q. Have you seen Mr. Hopkins, now here present, on any occasion where anything was said or done in regard to your testimony in this case; and, if so, mention all such occasions and what was said and done?

A. I met Mr. Hopkins here yesterday for the first time. I don't remember anything being said or done particularly.

110 X Q. How often has Mrs. Partridge been interviewed by Mr. Still or any representative of the Merrick Co. in regard to this matter of testimony?

A. I think three times.

111 X Q. And Mr. Partridge how often?

A. Only once.

112 X Q. Did Mr. Partridge ask you to take measures so that his wife would not be called as a witness?

A. I told Mr. Partridge that I would take such measures.

113 X Q. And you have done so, have you not?

A. Yes, sir; to the best of my ability.

Defendants' counsel, to avert the suspicion which complainants' counsel seems to be endeavoring to throw over this matter, states that he refrains from calling Mrs. Partridge as a witness solely on account of her condition, and that no agreement has been made to the effect that she shall not be called as a witness.

(Complainants' counsel objects to the above statement of facts by defendants' counsel as not proper testimony and an uncalled for interruption of this cross-examination.)

Defendants' counsel invites complainants counsel, now that he is here in Chicago, to call upon Mrs. Partridge to satisfy himself of the truth of the above statement and the entire good faith of all
1028 dealings between her and Mr. Root, the witness, and Mr. Still, defendants' agent in this city, so that complainants' counsel may not be tempted hereafter at the final hearing of this cause to make any unsuitable charges.

(Complainants' counsel objects to the above statement as immaterial and an interference with his cross-examination, and states that the claim at the final hearing will be based upon the evidence in the case and not on the impressions and statements of counsel on the record.)

114 X Q. Who was present when Mrs. Partridge signed the affidavit of Jan. 30, 1888?

A. I couldn't tell positively. I think the notary and Mr. Still were the only ones present.

115 X Q. Do you know in whose handwriting the body of that affidavit is?

A. No; I don't know.

(Defendants' counsel, Mr. Witter, states that it is in his own handwriting.)

(Complainants' counsel asks Mr. Witter if he was present when the affidavit was signed.)

(Defendants' counsel says he was not present, and adds that he has never seen Mrs. Partridge; that he prepared the affidavit from what he understood from Mr. Still that Mrs. Partridge would swear to, and gave the affidavit so prepared to Mr. Still to take to Mrs. Partridge for her oath and signature if she found it to be correct.)

116 X Q. Has not Mrs. Partridge, to your recollection, at some time told you that she asked for one kind of thread and got another instead of it?

A. Yes; but not so as to be deceived in the kind she purchased.

117 X Q. Was that the occasion that you were thinking
1029 of when you answered question 11 in your testimony of Jan. 12, 1888?

A. I think that must have been the occasion. Mrs. Partridge buys so little thread that she can remember an incident of that kind better than I could.

118 X Q. Then do you think that incident which you have given in such detail in questions 11, 12, and 13 of your testimony of Jan. 12, 1888, has no foundation in fact?

A. Well, I can't remember anybody else that I had a similar conversation with.

119 X Q. Do you mean you can't remember the name to give it?

A. I mean this: I can't remember whether that statement embodied in answers to questions 11, 12, and 13 was a mistaken impression of a conversation I had with Mrs. Partridge about that time or whether it was with somebody else.

120 X Q. You have a very distinct recollection of some such conversation with some one, have you not, and did have when you swore to it on your testimony on January 12, 1888?

(Same objection as to 70 X Q.)

A. Yes: I have a recollection of a similar conversation and thought it was with Mrs. Partridge, but was not positive.

121 X Q. If it was not Mrs. Partridge, you cannot give the name of the person?

A. No, sir; I cannot.

(Same objection as to last question.)

122 X Q. Now, in regard to the testimony you gave about O. C. Fischer, of Chicago, saying he was going to try to sell Merrick's thread, and that he thought he could sell it as well as Coats', because he didn't think people generally could generally tell it from Coats'; I refer you to questions 14–18, inclusive, of your testimony of January 12, 1888. Is not the same true in regard to that
1030 testimony as in regard to the testimony you gave about Mrs. Partridge, that you remember such statements as you have attributed to O. C. Fischer were made by somebody, and you believed at the time they were made by Fischer?

(Same objection.)

A. Yes, sir; I recollected somebody making some such statements and I thought it was Fischer until he convinced me otherwise.

123 X Q. Do you mean to now tell me, in view of the testimony you gave under oath for complainants on January 12, 1888, that you told me before going on the witness stand that you could not swear to having heard of any instance of deception?

A. No, sir; I mean to say that I was not positive in regard to the parties I mentioned.

124 X Q. You say in your affidavit of January 31, 1888, that you "tried to escape giving testimony." Did you make any other suggestion than that you had a headache and felt unwell and you would like to be excused on that account?

A. What I meant by escaping giving testimony was in regard to

Mrs. Partridge and taking her condition into consideration outside of the fact that I had a headache.

125 X Q. Your statement to me before giving testimony was that you did not want to bring Mrs. Partridge into the testimony, because she was in delicate health and expecting to be confined, and you were afraid she might be summoned as a witness if you mentioned the occurrence which you afterwards testified about in regard to her. Is that not a correct statement?

A. Yes, sir; but you told me at the time that you did not anticipate Mrs. Partridge's being called on the stand, so I didn't think there would be any trouble about it.

126 X Q. I told you that I would not call her myself as a witness under the circumstances, and said I did not think your
1031 giving the testimony would make any trouble for her. Was not that my statement?

A. Yes, sir; that was about it.

127 X Q. If Coats' and Merrick's number 40 spools, for example, one of each brand, had the black and gold paper label rubbed off by accident or otherwise defaced so as to be indistinguishable could the ordinary customer, in your opinion, by looking at the upper or embossed spool heads, distinguish one from the other?

A. I don't know that they could.

128 X Q. In a similar case, and leaving out the Merrick's spools, Coats' spools could be distinguished by their upper spool heads from any other brand, could they not?

A. Well, I guess they could in most cases.

129 X Q. The fact that Coats had a patent for the embossed numbers, and you were informed that Merrick's were infringing that patent, don't make the two spool heads look any more similar than they are in fact, does it?

A. No; it don't, but it's a fact that they look similar.

130 X Q. Do you know of Mrs. Partridge's ever buying Coats' thread?

A. No, sir; I do not.

131 X Q. You cannot say but that she has bought it and used it, can you?

A. No, sir; I cannot.

132 X Q. Kerr's and Chadwick's thread labels and spools—I refer to 200-yd. six-cord thread—are plainly distinguishable from Coats', are they not, and quite different looking labels to the ordinary customer?

A. Yes, sir; more especially Chadwick's, which have not the black and gold label.

And being further examined by Mr. WITTER, counsel for defendant-, the witness says:

133 R. D. Q. The letter, Defendants' Exhibit No. 62, Root
1032 Letter of January 20, 1888, was attached to and formed a part of your affidavit of January 26, 1888. Is not that so?

A. Yes, sir; it is.

134 R. D. Q. The affidavits of January 26 and of January 31, 1888, are in precisely the same language, are they not?
A. I believe they are.

The affidavit of January 26, 1888, is here offered in evidence and marked Defendants' Exhibit No. 64, Root Duplicate Affidavit.
(Objected to by complainants' counsel as incompetent, immaterial, and not the best evidence.)

135 R. D. Q. Do you mean by any part of your testimony that in order to shield Mrs. Partridge you stated anything that was false in your letter to me or in your affidavit, or merely that you became satisfied that you were mistaken, and that you then in part, in order to shield Mrs. Partridge, endeavored to correct your mistake?

(Objected to as leading.)

A. I made no false statement in my letter that I am aware of, but I found I was mistaken in regard to Mrs. Partridge, and so wrote and made affidavit.

P. V. ROOT.

Subscribed and sworn to before me this 3d day of March, A. D. 1888.

[L. S.] HENRY W. PROUTY,
Notary Public.

Examination adjourned, by agreement of counsel, until 10 o'clock, Monday, March 5, 1888.

1033 PALMER HOUSE,
CHICAGO, ILLINOIS, *March* 5, 1888—10 o'clock a. m.

Parties met pursuant to adjournment.
Present: Counsel as before.

EMMA G. JACKLIN, a witness of lawful age, produced on the part of the defendants, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by W. C. WITTER, Esq., counsel for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?
A. Emma G. Jacklin; age, 16; residence, 310 W. Polk street, Chicago; clerk in a grocery store at the same number.
2 Q. For or with whom are you clerk?
A. For my mother.
3 Q. Is spool thread sold at the store?
A. Yes, sir.
4 Q. What spool thread?
A. Merrick's.
5 Q. Where in the store do you keep this Merrick's thread?
A. In a cabinet on the counter.
6 Q. What cabinet?

A. Merrick's.

7 Q. Why do you call it Merrick's cabinet?

A. That's the name of it.

8 Q. In how plain sight is this cabinet to customers coming in at the door?

A. The name is in large letters on the drawer.

9 Q. How long is the name and how high are the letters?

A. The name is about a foot and a half long and the letters are about two inches high.

10 Q. Does the cabinet and this name face the door?

(Objected to as leading.)

1034 A. Yes, sir.

11 Q. What other threads besides Merrick's do you keep in the cabinet?

A. Nothing but Merrick's.

12 Q. Either in the cabinet or anywhere else?

A. Only in the cabinet.

13 Q. How long has the Merrick's cabinet been kept in that place on the counter with nothing but Merrick's thread in it?

A. About 5 months.

14 Q. During that 5 months has there been any one there to sell thread or other articles except yourself and your mother?

A. My sister on Saturday evenings and on Sundays.

15 Q. How is spool thread known and asked for by customers?

A. By its name.

16 Q. What is the name of the thread you keep?

A. Merrick's.

17 Q. How do you know that?

A. Because the name is on it.

18 Q. Is Coats' thread sometimes asked for at your store?

A. Yes, sir.

19 Q. What do you do or say in such case?

A. I say we don't keep Coats', but we only have Merrick's.

20 Q. Did you ever sell Merrick's when Coats' was asked for and leave the customer to believe or suppose that he had got Coats'?

(Objected to as leading and incompetent.)

A. No, sir.

21 Q. It has been stated that two ladies, strangers to you and your place, called at your store on a week day between the 12th and 18th of December, 1887, and asking for Coats' thread received Merrick's. If two women, strange to you, had called at your little store

1035 so recently as that and you had served them or seen them, would you be likely to remember it?

A. Yes, sir; because I am acquainted with our trade and would know strangers if I saw them.

22 Q. And would you be especially likely to remember it if two strange women came together?

(Objected to as leading.)

A. Yes, sir.

23 Q. Did you ever know of spool thread being known or distinguished in any other way than by the name?

A. Yes, sir; because Merrick's has a star in the middle and Coats' has a number in the middle.

24 Q. Then you know something about Coats' thread, do you?

A. Yes, sir; I have seen it.

25 Q. Is that the name it's called by, Coats', so far as you know?

(Objected to as leading. Question withdrawn.)

26 Q. What name is it called by?

A. Coats'.

27 Q. Is it the practice in your store to wrap up your spool thread in paper unless asked to do so?

A. Not unless they ask it.

And being cross-examined by Mr. SAMUEL R. BETTS, counsel for complainant-, the witness deposes and says as follows:

28 X Q. When did you first hear anything about testifying in this case?

A. About six weeks ago.

29 X Q. From whom?

A. From this gentleman, Mr. Witter, and another gentleman, who came to the store.

30 X Q. Had any one been to the store before that about this matter?

A. No, sir.

1036 31 X Q. What was said or done by Mr. Witter and the other gentleman when they first called?

A. I was not in the store when they first called, but ma was in. I came in after awhile.

32 X Q. What was said or done on that occasion while you were there?

A. The gentleman asked me if I remembered two strange ladies coming in and asking for Coats' cotton and getting Merrick's. I said "no." I told him that I didn't remember any two strange ladies coming in asking for Coats' and getting Merrick's. I told them we never made a practice of doing it, because when they would get home they would see that it was Merrick's and it would only be soiled and brought back; that that was not the right way to do business.

33 X Q. Was that all that you said?

A. Yes, sir.

34 X Q. What did they say that you heard?

A. They said, "Did I think it would be right to sell Merrick's thread when Coats' was asked for?"

35 X Q. Was there any more conversation then?

A. No, sir.

36 X Q. Have you ever had Merrick's spools returned to you by anybody?

A. No, sir.

37 X Q. How long have you been selling thread at No. 310 West Polk street?

A. Well, since last spring, as nearly as I can remember.

38 X Q. How long has your mother been selling thread there?

A. About the same length of time.

39 X Q. Have you ever sold any Coats' thread?

A. No, sir.

40 X Q. Then if any ladies called at your place, 310 W. Polk street, between the 12th and 18th of last December and got any thread there, it must have been Merrick's thread. Is that not true?

A. I don't remember selling any thread to strange ladies.

1037 41 X Q. If anybody got any thread at your store between the 12th and 18th of last December must it not have been Merrick's thread?

A. Yes, sir.

42 X Q. But you have no recollection about the circumstances of selling any thread to a strange lady or two strange ladies at about that time, have you?

A. No, sir.

43 X Q. Or what thread they asked for, if they did come to your store and get any thread; you can't remember that, can you?

A. No, sir.

44 X Q. Your sales are mostly by the spool or a few spools at a time, are they not?

A. Yes, sir.

45 X Q. Do you sell often to children who are sent to the store?

A. Yes, sir.

46 X Q. At what price per spool do you sell?

A. Five cents.

47 X Q. When did you get the Merrick's cabinet?

A. At the same time we got the thread—in the spring.

48 X Q. Did your mother start the store then, or how did it happen that you had not sold thread before?

A. No, sir; she started the store fifteen years ago, but previous to last spring I was at school.

49 X Q. What thread did your mother keep before getting the Merrick thread?

A. I don't know.

50 X Q. Did you never see any other make of thread in the store except Merrick's?

A. I don't remember that I did.

51 X Q. Two strangers might have come into your store and bought thread in December without your seeing them at all, might they not?

A. Yes, sir.

52 X Q. Do you mean to say that you remember all people who have come into your store since you have been regularly there as a clerk?

1038 A. All strangers.

53 X Q. Every stranger that has come in while you have been there since last spring?

A. As nearly as I remember I have.

54 X Q. And you think you can remember just what each of these strangers asked for, if you have waited on them?

A. I don't think I remember everything.

55 X Q. And you don't remember everything you have sold to strangers, do you?

A. Not exactly everything.

56 X Q. How large is your store in size?

A. That I don't know.

57 X Q. Don't you remember ever having had Coats' thread asked for since you have waited on customers?

A. Yes, sir.

58 X Q. And you never had any to sell to them, had you?

A. No, sir.

59 X Q. When have you seen Coats' spools to notice the appearance of them?

A. At different times, in places where I have been.

60 X Q. You say, in answer to question 13, that the Merrick cabinet has been kept in that place on the counter about five months. Were you not mistaken in that?

A. No, sir.

61 X Q. Where was it before it was kept in that place?

A. In the window, right by the front door.

62 X Q. Don't you frequently wrap up the spools of thread yourself, especially if you sell more than one spool at once?

A. Not unless they ask it.

63 X Q. But you would whenever they did ask it?

A. Yes, sir.

64 X Q. Who first called it to your attention that Merrick's has a star on the label?

1039 A. It is plain enough to be seen without your attention being called to it.

65 X Q. But who first did call your attention to it?

A. Not any one; I saw it myself.

66 X Q. Did any one speak to you about that star being a mark of Merrick's label before you began to testify?

A. Yes, sir.

67 X Q. Who was it?

A. The man who came in to sell it, who knew the different marks of the spools.

68 X Q. When was that?

A. At different times.

69 X Q. And he told you that was a distinction between Merrick's and Coats', did he?

A. Yes, sir.

And, being further examined by Mr. WITTER, counsel for defendant-, the witness deposes and says:

70 R. D. Q. Are any other articles sold at your store in the dry-goods line except Merrick's thread, or is your store almost exclusively a grocery store?

A. We keep nothing but groceries and Merrick's thread and pins and needles; that's all.

EMMA G. JACKLIN.

Subscribed and sworn to before me this 5th day of March, 1888.
[L. S.] HENRY W. PROUTY,
Notary Public.

CAROLINE JACKLIN, a witness of lawful age, produced on the part of the defendant-, having been first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by W. C. WITTER, Esq., counsel for defendants, deposes and says as follows:

1040 1 Q. What is your name, age, residence, and occupation?
A. My name is Caroline Jacklin; age, 48 years; reside at 310 W. Polk street, Chicago, where I have a grocery store.
2 Q. Do you keep Merrick's thread to sell?
A. Yes, sir.
3 Q. The young lady, Emma G. Jacklin, is your daughter, I believe, is she?
A. Yes, sir.
4 Q. Did you ever sell Merrick's thread to a customer asking for Coats' without letting them know that it was Merrick's?
A. No.
5 Q. Do you remember two strange women coming into your store along in December last and buying thread?
A. No, sir.
6 Q. Do you believe they did?
A. No, sir.
7 Q. If you had seen or served them do you think you would have remembered it?
A. Yes, sir; because I have nothing but neighboring trade and would notice strangers.

And, being cross-examined by Mr. SAMUEL R. BETTS, counsel for complainant-, deposes and says as follows:

8 X Q. How long have you been selling spool cotton at 310 W. Polk street?
A. As nearly as I can remember, since last spring.
9 X Q. You had nothing but Merrick's thread in stock in last December?
A. No, sir.
10 X Q. Then if any lady got any thread at your store it must have been Merrick's thread. Is that so?
A. Yes, sir.
11 X Q. Will you testify that no ladies whom you do not know personally and by name were in your store last December?
1041 A. No, sir; not to my knowledge.
12 X Q. You mean you don't remember any being in?
A. I don't remember.

13 X Q. You are not in the store the whole time of every day, are you?

A. No, sir; but we have a neighboring trade, and if any stranger comes in we know it and notice it.

(All words after the words "no, sir," objected to as irresponsive.)

14 X Q. And when you are not in the store you don't know who comes in, do you?

A. No, sir.

15 X Q. Don't you have people you don't know coming into your store every week or so, at least?

A. Once in awhile; yes.

16 X Q. And you sell them without asking them to give their name or who they are, don't you?

A. Certainly.

17 X Q. Why do you say you don't believe that two ladies came into your store last December and bought thread; do you mean you don't remember it?

A. No, sir; I mean that it is very seldom that I sell spools—I mean if they call I notice it, because they ask for different numbers, and whilst I am getting it there would be something said, so that I would notice strange ladies.

18 X Q. And that is why you believe these ladies did not buy thread in your store last December, because you don't remember any conversation with them about the matter?

A. Yes, sir.

19 X Q. When did you learn you would be asked to testify in this case and from whom?

A. About six weeks ago, as near as I can tell, from this gentleman (pointing to Mr. Witter) and from another gentleman whom I don't know.

20 X Q. Have you been subpœnaed to testify in this case?

1042 A. No, sir.

21 X Q. At whose request did you come?

A. A messenger was sent for me this morning.

CAROLINE JACKLIN.

Subscribed and sworn to before me this 5th day of March, 1888.

[L. S.] HENRY W. PROUTY,
Notary Public.

Examination adjourned until 2 o'clock p. m.

PALMER HOUSE,
CHICAGO, ILLINOIS, *March* 5, 1888—2 o'clock p. m.

Parties met pursuant to adjournment.
Present: Counsel as before.

MARY ABRAHAM, a witness of lawful age, produced on the part of the defendants, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in

the matter of controversy herein, and being examined by W. C. WITTER, Esq., counsel for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Mary Abraham; I am 30; 913 Clybourne avenue, Chicago; fancy goods, dry goods, boots and shoes.

2 Q. How long have you and your husband had the business there?

A. Three years in May—August, I mean; we started to build in May.

3 Q. Has any other lady attended to selling goods there except yourself?

A. No, sir.

1043 4 Q. What six-cord spool threads have been kept on sale at 913 Clybourne avenue during the last six months?

A. Merrick's and some Coats'; not such a big assortment, though, as Merrick's.

5 Q. Do you remember when you put in a stock of Merrick's six-cord spool-thread?

A. I can't exactly remember, but it seems to me as if it was just about a year this spring.

6 Q. Where have you kept this Merrick's thread?

A. Right on the counter.

7 Q. In what?

A. In a case; Merrick's case.

8 Q. Is it a large or a small sized Merrick's case or cabinet?

A. Large.

9 Q. Do you keep any other thread in that cabinet?

A. Not in that cabinet.

10 Q. Has that cabinet the name of Merrick in plain and large letters upon it?

A. Yes, sir.

11 Q. And if any one buys Merrick's thread of you it is taken from that cabinet, is it not?

(Objected to as leading.)

A. Yes, sir.

12 Q. When people buy spool thread of you do you wrap it up in paper or hand it to them unwrapped?

A. Unwrapped.

13 Q. Did you ever sell Merrick's thread to any one asking for Coats' and let them go away thinking they had Coats'?

(Objected to as incompetent and as it is impossible the witness should know what the customer thought.)

A. No, sir.

1044 14 Q. Did you ever sell Merrick's thread to any one asking for Coats' with the idea that they should suppose they had received Coats'?

A. No, sir.

And, being cross-exam-ed by Mr. BETTS, counsel for complainants, witness says:

15 X Q. In last December, 1887, did you not have both the Coats' and Merrick's thread in stock?

A. Yes, sir.

16 X Q. And was selling both to customers, were you not?

A. Yes, sir.

17 X Q. Did you not sell some Merrick's thread between the 12th and 18th of December, to the best of your recollection?

A. Yes, sir; sell it most every day—every day.

18 X Q. At what price per spool do you sell it?

A. Five cents.

19 X Q. Do you often have strangers come into your store—I mean people you do not know the names of—to make purchases?

A. Seldom.

20 X Q. You don't pretend to be able to give the names of all the people who have made purchases in your store for the last three months, do you?

A. No, sir.

21 X Q. Who sells small articles there besides yourself and was doing so last December?

A. My husband.

22 X Q. Any one else at any time?

A. No, sir.

23 X Q. Do you buy Merrick's thread cheaper than you bought Coats'?

A. Yes, sir.

24 X Q. And sell it at the same price as Coats', do you not?

A. Yes, sir.

25 X Q. And thus make a larger profit by selling Merrick's than you can by selling Coats', do you not?

A. Yes, sir.

1045 26 X Q. Of what make has your last purchase been—Merrick's or Coats'?

A. Merrick's.

27 X Q. When was that?

A. Last week.

28 X Q. And when last before that?

A. I don't remember exactly.

29 X Q. Give the date as near as you can.

A. We buy thread about every week.

30 X Q. When last have you bought any Coats'?

A. I don't remember last.

31 X Q. Quite awhile ago?

A. Oh, we keep buying it now and then, but we don't buy as much Coats' as we do Merrick's.

32 X Q. You are introducing Merrick's to your customers in preference to Coats', are you?

A. If they ask me for Coats' I get it for them if I've got it.

33 X Q. But if they just ask you for a spool of cotton you give them Merrick's, don't you?

A. No, sir; I ask them what kind they want.

34 X Q. And if they say they don't know or they don't care what do you give them?

A. Give them Merrick's.

35 X Q. Because you make a bigger profit on it?

A. Yes, sir.

36 X Q. What numbers of Merrick's were you keeping in stock in December, 1887?

A. All numbers?

37 X Q. Please mention them.

A. From eight to seventy.

38 X Q. In the Merrick cabinet, were they?

A. Yes, sir.

39 X Q. How have you been in the habit of keeping your Coats' thread?

A. In a smaller case on a shelf.

40 X Q. What other makes except Coats' or Merrick's have you ever sold?

A. Parker's.

41 X Q. Any other?

A. No, sir.

1046 42 X Q. Will you swear that you had any of Coats' number 30 six-cord thread in stock between the 12th and 18th of last December?

A. No, sir; we generally keep 40 and 50.

43 X Q. But you did have Merrick's No. 30 in stock, did you not, between the 12th and 18th of last December?

A. If we didn't run out of it we had it.

44 X Q. You think you had it, don't you?

A. We sometimes run out of a number.

45 X Q. Don't you believe you had Merrick's No. 30 in your store between December 12th and 18th, 1887?

A. Can't say for certain.

46 X Q. You have no recollection that you were out of it, have you—I mean Merrick's number 30—at that time?

A. No, sir.

47 X Q. So the only number 30 six-cord thread that you had, to the best of your recollection, between December 12th and 18th, 1887, was Merrick's. Is that not true?

(Objected to as containing a statement not quite warranted by the evidence.)

A. If I didn't run out of it I had it.

48 X Q. Will you swear that you had any of Coats' number 50 six-cord thread between December 12th and 18th, 1887?

A. We most always have it if we don't run out of it; 40 and 50 always.

49 X Q. Do you remember any incident of two ladies coming into

your store, 913 Clybourne avenue, between December 12th and 18th, 1887, and buying several spools of thread?

A. No, sir; sell thread every day; can't remember now who was in for it and who wasn't.

50 X Q. And you don't remember one of those ladies coming again the next day and buying some more spools of thread, do you?

A. No, sir.

1047 51 X Q. Or what kind of thread they asked for on those occasions, do you?

A. No, sir.

52 X Q. Or what kind of thread they got at your store; you don't remember that, do you?

A. No, sir.

53 X Q. Or whether you wrapped it up or not for them; you don't remember that, do you?

A. I don't wrap up a spool of thread unless I am asked to do so.

54 X Q. When you sell two or three spools at once don't you wrap them up together sometimes?

A. Not that I remember that I wrapped them up for any one.

55 X Q. If they asked you to you would do it, would you not?

A. Certainly.

56 X Q. And you are in the habit of wrapping up small parcels in your store for customers, are you not?

A. Not thread.

67 X Q. Small parcels in general you wrap up, don't you?

A. Yes, sir.

58 X Q. What kind of wrapping paper do you use?

A. Ordinary wrapping paper.

59 X Q. Brown wrapping paper or what?

A. Light brown.

60 X Q. If a person came in and asked for Coats' thread and you did not have Coats' in the number they wanted, would you not sell them Merrick's thread of that number if they would take it?

A. I'd tell them I hadn't got it; I'd got Merrick's. If they wanted it they would take it.

61 X Q. Then you would sell them Merrick's, even though they asked for Coats', when you were out of Coats', would you not?

A. Not unless I told them.

62 X Q. Well, you would sell Merrick's to them if they would take it, having first made an explanation, as you say, would you not?

1048 A. Yes, sir; if they wanted it.

63 X Q. And you are quite sure that you always took time to make the explanation, are you?

A. Yes, sir.

64 X Q. Are you selling Merrick's now to some of your customers to whom you formerly sold Coats'?

A. If they want it.

65 X Q. Do you not, as a matter of fact, now sell Merrick's to customers to whom you formerly sold Coats'?

A. If they want it.

66 X Q. Which is the handiest for you to get spools from, the Merrick cabinet or the boxes where the other styles of spools are kept?

A. The Merrick.

67 X Q. It is right out on the counter, is it not?

A. Yes, sir.

68 X Q. Where you can get into the drawers with very little trouble. Is that so?

A. I can get to either with little trouble.

69 X Q. What is your husband's name?

A. William Abraham.

70 X Q. Has he been here present during your examination?

A. No, sir.

71 X Q. Do you sell principally by the small quantity, from one to five spools of thread or less than a dozen?

A. Sell as many as anybody wants.

72 X Q. I want to know what the fact is. Are most of your sales small sales of from one to a dozen to a single customer?

A. I don't remember that I ever sold a dozen spools to one customer?

73 X Q. Always less?

A. Yes, sir.

74 X Q. Do you often sell to children, who are sent in to buy a spool or two?

A. Yes, sir.

75 X Q. Have you come here under subpœna?

A. There was no legal paper served upon me.

1049 76 X Q. Why did you come?

A. Why, the Merrick Company asked me to come. Wasn't that it?

77 X Q. When did you first hear that you were to be requested to testify in this case?

A. Some weeks ago.

78 X Q. Who told you?

A. Mr. Witter, and I forget the other gentleman's name.

79 X Q. Where was it?

A. In my store.

80 X Q. What did they say to you about the matter?

A. They told me that the Merrick Company was sued by the Coats Company and the Coats Company had some lady detectives out. They asked me if I ever sold Coats' for Merrick's. I said no. I told them no.

81 X Q. Did they tell you what the other ladies had testified that they had detected in connection with their purchase of thread at your store?

A. I don't remember whether they did or not.

82 X Q. Have you not been told that it has been testified to in this case that on two separate occasions ladies went to your store and asked for Coats' thread and received Merrick's without any explanation being made?

A. Yes, sir.

83 X Q. Who told you that?

A. This gentleman and the other who was with him. I guess it was this gentleman (pointing to Mr. Witter).

84 X Q. How often have you been spoken to in regard to your testimony before being sworn?

A. Twice.

85 X Q. And by whom?

A. Once by this gentleman (pointing to Mr. Witter) and by their agent. I don't know whether his name was Mr. Moore or not.

1050 86 X Q. How long ago and where did their agent, whose name you think is Moore, speak to you about the matter?

A. Either last Thursday or Friday at my place—my store.

And being further examined by Mr. WITTER, the witness says:

87 R. D. Q. What cabinet is the other one you have spoken of beside the Merrick's?

A. Coats'.

88 R. D. Q. And is the name Coats on it in plain letters?

A. Let me see. Is that a Coats or a Willimantic? We have had it so many years. I think it's a Willimantic, if I'm not mistaken.

89 R. D. Q. If it is a Willimantic it has the name on it, has it not?

A. Yes, sir.

90 R. D. Q. And if it is a Coats it has the name on it, too, has it not?

(Objected to as leading and without foundation.)

A. If it is a Coats, yes.

91 R. D. Q. And is that the cabinet in which you keep Coats' thread?

A. Yes, sir.

MARY ABRAHAM.

Subscribed and sworn to before me this 5th day of March, A. D. 1888.

[L. s.] HENRY W. PROUTY,
Notary Public.

Adjourned to 10 o'clock Tuesday morning.

1051 PALMER HOUSE,
CHICAGO, ILLINOIS, *March* 6, 1888—10 o'clock a. m.

Parties met pursuant to adjournment.

Present: Counsel as before.

WILLIAM T. HART, a witness of lawful age produced on the part of the defendants, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by W. C. WITTER, Esq., counsel for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. William T. Hart; age, 50 years; residence, 1662 Milwaukee avenue, Chicago; occupation, cabinet, house, and office fitter.

2 Q. When you are not occupied with your trade what do you do?

A. I attend the store at 1662 Milwaukee avenue.

3 Q. Where were you just previous to last Christmas? What were you doing, and for how long a period previous to last Christmas were you so occupied?

A. About fourteen days before Christmas principally in the store. I was principally attending store. I was so occupied for about two weeks—a little more than that.

4 Q. When you are thus at home who attends at the store and waits upon customers principally?

A. I do myself.

5 Q. When you are not at home who attends to the store?

A. My wife, invariably.

6 Q. Does any other person attend to the store except either yourself or your wife?

A. No; not to my knowledge.

7 Q. What spool thread has been sold there during, say, the last six months?

1052 A. Merrick's only.

8 Q. When customers are sold Merrick's thread from your store by the spool or a few spools at a time where do you get it?

A. From the cabinet.

9 Q. From what cabinet?

A. Merrick's.

10 Q. Have you personally sold a dozen at a time in the dozen box, box and all?

A. Yes.

11 Q. As you are supplied with dozens of Merrick's thread from time to time, does it come to you in dozen boxes?

A. It comes a dozen spools in a box, if I recollect right.

12 Q. Where have you kept your Merrick's cabinet, say, for the last six months or so?

A. In plain sight; on the counter in plain sight of every one coming in.

13 Q. Has the cabinet anything upon it indicating the kind of thread that is kept in it; if so, what?

A. Merrick's own label mark: Merrick's thread and spools. I can't just word it exactly. It is a five-drawer cabinet.

14 Q. How plainly does the word "Merrick's" appear upon the cabinet?

A. In quite large letters. I should judge in about 1¼-inch letters; about that.

15 Q. In what other way or ways do you inform the public that Merrick's thread is on sale at your place?

A. By a picture of our army life in the army exhibited in the window, and also by a shuttle thread exhibited in the window.

16 Q. And is the name Merrick prominently connected with both these articles?

A. Very prominently.

17 Q. Have you any notice, sign, or advertisement anywhere about your store to the effect that you sell Coats' thread, or have you had any such during the last six months?

1053

A. None whatever.

18 Q. And have you during the last six months or so sold or kept on sale any spool thread except Merrick's?

A. None whatever but Merrick's.

19 Q. Were you ever aware that Coats' thread has the number of the thread stamped or otherwise appearing in the wood of the spool?

A. I don't recollect ever noticing Coats' spool so minutely as to recollect anything of the kind.

20 Q. Do your customers sometimes ask simply for a spool of thread without further description?

A. Generally.

21 Q. In such cases what thread do you sell them?

A. Merrick's.

22 Q. Do you remember any instance of Merrick's thread being returned to you under such circumstances?

A. Yes; once.

23 Q. Why?

A. Not being Coats' or Clark's. I don't recollect which.

24 Q. How are threads known and asked for so far as your experience goes?

A. By name.

25 Q. Do customers sometimes or did they in times past sometimes ask for Coats' thread?

A. Yes; but principally Clark's.

26 Q. During the time that you have kept Merrick's only what has been your practice when Coats' or Clark's is asked for?

A. Don't keep it.

27 Q. Do you mean that that is what you say to them?

A. Yes; I might say a little more to them.

28 Q. Well, what more do you sometimes say?

A. That I intend to keep it in the future.

29 Q. State whether you have changed that intention, and why.

1054

A. Now, I may get that down a little lengthy, but will do the best I can. The demand lately has been for Merrick's, and there is no demand for any other brand. Yes; I have somewhat changed my intention.

30 Q. When Coats' or Clark's thread has been asked for have you ever sold Merrick's, seeking in any way to give the impression that the customer was receiving Coats' or Clark's?

(Objected to as leading.)

A. Never. I always explained to them that I didn't keep it or hadn't kept it.

31 Q. When Coats' or Clark's had been asked for have you ever

sold Merrick's, leaving the customer to believe that Coats' or Clark's had been received?

(Same objection.)

A. No; never.

32 Q. State whether or not it is the practice at your store to wrap the spool or spools of thread in paper for the customer.

A. Generally not.

33 Q. Do you unless requested?

A. Individually I never have.

34 Q. State whether or not you are acquainted, by sight or otherwise, with the trade—that is, the customers that purchase at your little store.

A. As a general thing I am.

35 Q. If, during the two weeks or more preceding last Christmas when you were principally attending store, two ladies unknown to you had come into your store and asked for Coats' thread or otherwise to trade, state whether or not you would have been likely to notice them and to remember the fact.

(Objected to as leading.)

A. I most assuredly should.

1055 36 Q. Did any such pair, so far as you remember, during that time go into your store and ask for Coats' thread or for any other purpose?

A. From me individually they did not.

37 Q. Did you during that time notice such a pair prowling along in front of your store? If you did notice such a pair in front of your premises, state the circumstances fully. By prowling I mean with the appearance of hunting about for something.

A. I did; I noticed two ladies, one taller than the other. Judging from looking through the window, the oldest seemed to be somewhere in the neighborhood of 45 or 50, she being the tallest; rather given to brown—between light brown and gray—hair. The shorter one was rather thicker set, not apparently quite so old. My attention was attracted to them by their apparently — over the store; some name or number; apparently looking up. For several moments they moved backward and forward in front of the west window, looking up, when the elder one—the tallest one—seemed to catch the notice of the soldier in the picture in the window, which is an advertisement of the Merrick thread. She pointed to the shorter lady. Then she caught sight of the shuttle spool cotton which I had exhibited in the window. Then they looked up as if to discover a name or number, I not thinking whether it was I or my neighbor they were looking for. That was the last I saw of them.

38 Q. Did they enter the store?

A. They did not.

39 Q. The shuttle cotton or spools that you refer to was of what make?

A. Merrick's.

40 Q. Did you ever see these two women before or since, so far as you remember?

A. Never in my memory.

41 Q. Would you recognize them if you should see them to-day?

1056 A. The older of the two I most assuredly would. As to the younger of the two it is doubtful; of her appearance I did not take so much notice.

And, being cross-examined by SAMUEL R. BETTS, Esq., counsel for complainants, deposes and says as follows:

42 X Q. Was your wife attending to sales in the store all last December?

A. All the time in my absence, to my knowledge.

43 X Q. And during the days that you were there was she not in the store?

A. Yes; at intervals.

44 X Q. And made some sales, did she not?

A. She did.

45 X Q. May she not have sold to some people during that time whom you did not see?

A. Yes; possibly.

46 X Q. Did you ever sell Coats' thread at your store?

A. No; never.

47 X Q. What makes have you sold?

A. Merrick's only.

48 X Q. How long have you or your wife been selling thread at that store at 1662 Milwaukee avenue?

A. For a little over one year.

49 X Q. And have you never sold or kept any thread except Merrick's during that time?

A. Not any other.

50 X Q. Then, if any ladies got two spools of thread at your store, 1662 Milwaukee avenue, between the 12th and 18th of last December, it must have been Merrick's thread; is that not true?

A. Yes; it must have been Merrick's thread.

51 X Q. No matter what they asked for, they could not have received any kind of thread except Merrick's there, could they?

A. None other but Merrick's.

52 X Q. Customers sometimes ask for Coats' thread, do they not?

A. Sometimes Coats' or Clark's.

1057 53 X Q. Did you have No. 30 of Merrick's thread in stock between December 12th and 18th of last year?

A. Could not say exactly; I think we had.

54 X Q. How did you happen to be attending in your store principally for about fourteen days before last Christmas?

A. Because my occupation of a mechanical trade had given out. I had finished my contracts about the fore part of December, leaving me nothing else to attend to.

55 X Q. During the two weeks before last Christmas did you not do any other work except attend in your store?

A. Yes; at internals I worked on my house on Powel avenue.

56 X Q. How often were you there; most every day?

A. Well, no; not every day; perhaps on an average of three times a week; not all day at that; part of the day.

57 X Q. Which part of the day generally?

A. As a general thing mornings—part of the mornings.

58 X Q. How far is that house on Powel avenue from your store, No. 1662 Milwaukee avenue?

A. Two blocks and a half.

59 X Q. How long were you generally at the house on Powel avenue when you went there to work?

A. Sometimes an hour or two—two or three hours; hardly ever half a day.

60 X Q. And when you were away from the store your wife attended to customers, did she?

A. She always attended in my absence, so far as my knowledge.

61 X Q. Who do you get your Merrick thread from?

A. The Merrick Company, at 205 Fifth avenue.

(Witness refers to a card before giving the number.)

1058 62 X Q. How long have you had the Merrick cabinet you speak of?

A. A little over a year, or since it came to me with my first shipment.

63 X Q. You speak of an instance where Merrick's thread was returned to you as not being Coats' or Clark's; how did you happen to sell it to a customer who wanted another brand?

A. It was a child; it did not call for any particular brand; that was returned because they wanted either Coats' or Clark's; I don't remember which. I think it was Clark's they wanted.

64 X Q. You sell mostly small quantities—one, two, or three spools—at a time, do you not?

A. Yes.

65 X Q. And often to children, do you not?

A. Children generally are sent for it.

66 X Q. The reason why the demand at your store is for Merrick's is because your regular customers know you don't keep any other make; is that not so?

A. As a general thing; sometimes they ask for another brand. When told that we do not keep it, they say that that is as good as the other; they know no difference.

67 X Q. At what price per spool do you sell Merrick's?

A. Five cents.

68 X Q. If any one comes into your store and asks for Coats' thread you have to sell them Merrick's or nothing, do you not?

A. I tell them we keep only Merrick's and they seldom go without it; very seldom.

69 X Q. Even though they ask for Coats' you generally manage to sell them Merrick's; is that what you mean?

(The word manage is objected — by defendants' counsel.)

A. If they ask for any other brand I distinctly tell them
1059 that we have not kept any other brands, as a rule; as a general rule they say it's all the same.

70 X Q. So that you generally make a sale of Merrick's, even when Coats' is asked for?

A. To my individual memory only three spools have thus been refused.

71 X Q. Is not the two weeks just before Christmas a busier time than other seasons in your store?

A. It is not perceptible, very perceptible, in our business.

72 X Q. When a couple of spools of thread are sold at once, are they not sometimes wrapped up for the customer?

A. I never wrapped any up individually myself.

73 X Q. Are they not sometimes wrapped up in your store?

A. My wife, being more particular than I am, sometimes thinks she does.

74 X Q. If a customer asked to have anything she bought wrapped up it would be done for her, would it not?

A. Most certainly would.

75 X Q. You don't remember all the customers who came into your store during the two weeks before Christmas, do you?

A. No; I do not.

76 X Q. And of course you don't know those who came in while you were absent working on your house?

A. No; I do not.

77 X Q. Do you remember whether you did any work on your house on the day you say you saw two ladies you describe as looking around outside your store?

A. I cannot remember if I did in the morning; possibly I did not after dinner for that same day.

78 X Q. What day of the week was that?

A. To my best recollection I should think it was Friday or Saturday. Friday seems to be the prevailing idea in my mind.

1060 79 X Q. How many days before Christmas was this?

A. Well, it must have been two weeks before Christmas—that is, in the two weeks before Christmas—but the exact date I couldn't tell.

80 X Q. Well, how many days before Christmas?

A. 'Twould be impossible for me to say, but could roughly estimate it. It was the last week of the two weeks before Christmas.

81 X Q. Then you think it was the Friday or Saturday of the last week before Christmas. Is that your best recollection?

A. Placing events in my mind, it would appear at the uttermost that it was Saturday afternoon; possibly it might have been Friday; but, at the uttermost, it was Saturday, in my mind.

82 X Q. Saturday of the week before Christmas. Is that your best recollection?

A. The last Saturday of the two weeks before mentioned.

83 X Q. That is, of the two weeks during which you attended the store?

A. Yes.

84 X Q. When did you first learn you would be asked to testify in this case?

A. Definitely, I could not say what date, but I think between the middle and the last of January.

85 X Q. From whom and where did you learn this? Give all the conversation on that occasion.

A. Well, I couldn't give his name; it was the agent of the Merrick Thread Co. here, at their office on Fifth avenue; you've got the number there; the agent or manager; I don't know his name. He told me that I should probably be wanted for a witness or be called upon the stand to witness something in regard to the thread, as to some women that had bought thread, they having asked for Coats' and received Merrick's. I distinctly told him that it was not so.

86 X Q. How did you happen to go to the office of Merrick's agent?

1061 A. I owed them a bill and I went to pay a part of it.

87 X Q. Had any one called on you or written to you asking you to go to the Merrick agency?

A. No.

88 X Q. When did you next hear anything more about testifying?

A. I think it was last Saturday; won't be positive; when I got home in the evening; Friday, I mean. Friday my wife informed me some one had called to see if I might be in readiness Saturday morning to go to some place to testify in regard to some transactions or something.

Examination adjourned until 2 o'clock p. m.

PALMER HOUSE,
CHICAGO, ILLINOIS, *March* 6, 1888—2 o'clock p. m.

Parties met pursuant to adjournment.
Present: Counsel as before.

89 X Q. Was it Mr. Still whom you saw at the agency of the Merrick Thread Company?

A. I don't know the gentleman's name. I took him to be the superintendent of the firm there.

90 X Q. Did he or any one tell you that testimony had been given to the effect that ladies who asked for Coats' thread at your store had received Merrick's without any explanation being made?

A. Well, the same gentleman who I took to be the same as you name said something in regard to a transaction of that kind. I don't distinctly remember what the conversation was. It was something bearing on that.

91 X Q. And did he ask you to come and testify and contradict it?

A. Never was any such conversation.

1062 92 X Q. Did he ask you to come and testify?

A. He thought that he should want me to testify in regard to some things of that kind.

93 X Q. Have you been subpœnaed to come here?

A. Not as I have seen any subpœna; simply a notice left at the store; verbal notice given to my wife.

94 X Q. And you came down voluntarily to give your testimony?

A. Yes.

95 X Q. Have you made any affidavit before testifying here about the matter?

A. No; I have not.

And, being further examined by Mr. WITTER, he says:

96 R. D. Q. How far is 1662 Milwaukee avenue from the central portion of Chicago, here at the Palmer house or the post office, for example?

A. It is generally conceded five miles.

97 R. D. Q. And is 913 Clybourne avenue about as far?

A. I think about a little over half the distance, not knowing positively; think so.

98 R. D. Q. Won't you reflect again at the distance to 913 Clybourne avenue and state whether it isn't nearer five miles in your judgment than three? I put the former question to you from my own impression of the distance, having made it, and also from what I understood you to say about it. I understood you to say that 310 West Polk street was about half as great a distance as to 1662 Milwaukee avenue. One of complainants' witnesses, speaking of the distance to 913 Clybourne avenue, says, "It was an awful distance." Please, after reflection, give your best judgment as to the distance in miles, first, to 310 West Polk street; next, to 913 Clybourne avenue, and, last, to 1662 Milwaukee avenue from the post office.

(Objected to as leading, immaterial, and already answered.)

1063 A. First, distance from post office to 310 West Polk street must be about two and a half miles from post office; and, second, upon due reflection I think it must be in the neighborhood of four miles to 913 Clybourne avenue. I don't see how it could run over that. 1662 Milwaukee avenue is about five miles from the post office.

99 R. D. Q. It may be argued from your cross-examination that the Friday or the Saturday which you speak of as lying in your mind as the possible day when the two women strangers were seen by you at 1662 Milwaukee avenue were the 23d or the 24th of December, they being the Friday and Saturday preceding Christmas. Did you so mean to be understood?

A. I so meant to be understood; not the day before Christmas, not the Saturday before Christmas, but the week preceding the Saturday before Christmas.

100 R. D. Q. Is your impression that the day was Friday or Saturday supported by any memoranda or circumstance in your mind or is it merely an impression for which you can give no particular reason?

(Objected to as leading.)

A. It's an impression for which I cannot give no particular reason.

101 R. D. Q. And the day may have been Tuesday or Monday or Wednesday, may it not, notwithstanding this impression?

(Objected to as leading.)

A. It might have been.

W. T. HART.

Subscribed and sworn to before me this 6th day of March, A. D. 1888.

[L. S.] HENRY W. PROUTY,
Notary Public.

1064 HARRY PHILLIPS, a witness of lawful age, produced on the part of the defendants, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by W. C. WITTER, Esq., counsel for *deponents*, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. My name is Harry Phillips; my residence is 3217 Indiana avenue; my occupation is salesman for the Merrick Thread Company; my age is 33.

2 Q. Henry A. Young and Charles A. Koch, witnesses for complainants, of Lake City, Minnesota, have testified regarding the statements and incidents occurring at a visit which you made to their store in Lake City some time last fall, and I wish to ask you a few questions touching those statements and incidents. Do you remember the occasion? If so, when was it?

A. It was on October the 30th, 1887.

3 Q. Charles A. Koch says, in answer to the 12th question, that on that occasion you "made a statement to the effect (I can't recall the exact words) that we could use the Merrick thread together with the Coats, there not being much difference in the labels and appearance of the spools." State whether that testimony is true or false.

A. It is not true.

4 Q. Question 13 and answer of Mr. Koch's deposition are as follows:

"Q. 13. Was anything said to the effect that you could sell the Merrick for the Coats thread sometimes?

"A. Nothing more than that. The appearance of the spools being so near alike we could sell the one for the other."

State whether you at that time or at any other time ever
1065 made such a statement to Mr. Koch or Mr. Young or any statement that will bear any such construction.

A. No, sir.

5 Q. Did you on this or any other occasion make any reference whatever to either of these gentlemen to any similarity or dissimilarity of the Coats' and Merrick's spools or labels?

A. I never did on this nor on any occasion.

6 Q. Did you visit that store on more than one occasion previous to January 1st?

A. No, sir.

7 Q. Mr. Young in his testimony speaks of certain tests which he says you made in his presence and which he himself made in your presence on this occasion as found in cross-questions 75, 76, 77, 78, 79, and 80 and 81 and their answers, which I now read to you, and then ask you to state whether, so far as he went, Mr. Young stated the circumstances of those tests pretty correctly.

(The questions 75 to 81 and answers read.)

(Objected to as leading and not in answer to complainants' last testimony.)

A. He did; he did all but one test; that he did not mention there. I crossed one thread with him—one of our threads and one of Coats'—and Coats' broke.

8 Q. Did Merrick's break on this test?

(Objected to as leading and not in answer to complainants' last testimony.)

A. No, sir.

9 Q. How many tests did you make with the tester and how many with the interlocked threads and how many with the tied threads? I mean as well as you can recollect and bearing in mind your habit in such cases.

(Objected to as leading and not in answer to complainants' last testimony.)

1066 A. I should judge five or six times in each one in each way.

10 Q. State whether Mr. Young also himself tested the threads.

(Same objection.)

A. Mr. Young went to his cabinet and took four or five spools of his thread—Coats' thread—out of his cabinet and took my thread-tester and some of the different sizes of Merrick's thread and he tested them all himself, and ours, he claims, proved to be the best—the Merrick thread—at that time.

(Answer objected to as hearsay.)

11 Q. What was the result, in fact, of your tests and of his tests?

(Same objections.)

A. The Merrick thread outpulled 'em and broke 'em every time—broke Coats' thread every time.

12 Q. Did you ever have any other testing match with Mr. Young or Mr. Koch?

(Same objections.)

A. No, sir.

13 Q. Did they give you an order for Merrick's thread?

(Same objections.)

A. No, sir.

14 Q. What reasons, if any, did they give you for not giving you an order?

(Same objections and as calling for hearsay.)

A. They told me it was the last of the season and they wanted to get their bonus of Coats' thread; that I should go and sell to the rest of the merchants in town the Merrick thread and the next season they would buy our goods.

15 Q. Did they or either of them on that occasion claim
1067 or say anything to the effect that the Merrick thread which you tried to sell them was a fraud upon the Coats or that the spools or labels looked like the Coats or were in any respect an imitation of the Coats'?

(Objected to as immaterial.)

A. No, sir; they never did.

16 Q. But if I understand you they recommended you to sell your thread to the neighboring dealers in Lake City and that after awhile they would buy themselves the Merrick thread. Is that what you mean?

(Objected to as immaterial, leading.)

A. Yes, sir.

17 Q. Did you hear, when it was given, the testimony of Mr. Young on these points which I have read to you from his testimony?

A. Yes, sir.

And being cross-examined by Mr. BETTS, the witness says:

18 X Q. How long have you been salesman for the Merrick Thread Company?

(The question is objected to as not opened by the direct examination. Complainants' counsel is requested to limit his cross-examination to the direct strictly, viz., to what was said and done on the occasion last fall when the witness visited the house of C. F. Young & Brother in Lake City.)

(Complainants' counsel refers defendants' counsel to questions 1, 4, 5, 6, 15 of the direct examination, and in view of those questions and the general latitude allowed to the cross-examination on the points of character and interest of witness, etc., will pay no attention to the request, which he considers without any foundation.)

1068 (Defendants' counsel says that in view of the object of the question, as expressed by complainants' counsel, he withdraws the objection.)

A. About two years.

19 X Q. In what territory?

A. In Minnesota and Dakota.

20 X Q. On a salary?

A. Yes, sir.

21 X Q. How far back does your acquaintance with the thread business date?

(Defendants' counsel considers this question not warranted by the direct, which was limited to the fact that the witness is agent for the defendant company and to the facts of the interview referred to, and asks complainants' counsel not to take the time of defendants' counsel for such questions or for any questions not bearing upon the two subjects above mentioned, and he asks complainants' counsel if he has any reason to suppose, and, if so, what, that the character of the witness is not all it should be.)

(Complainants' counsel refers to questions 7 to 12 of the direct examination, in which testimony is given as to certain tests of thread and desires to ascertain the experience of the witness in view of that testimony.)

A. About 15 years.

22 X Q. Where was that and with whose thread?

A. With Mile-end, in Chicago; with Mile-end and Coats', and in fact all the six-cord threads, the leading brands.

23 X Q. When did you first come in contact with Merrick's thread?

A. About three years ago; it might be three and a half years.

24 X Q. Under what circumstances?

1069 A. Jobbing the threads for the trade.

25 X Q. Whereabouts?

A. In Chicago.

26 X Q. You sell Merrick's thread cheaper to the retailers in the district in which you represent it than they can buy Coats', do you not?

A. Yes; a trifle cheaper.

27 X Q. And throughout that district Merrick's thread is sold at retail at five cents a spool, is it not?

A. Yes, sir.

28 X Q. When did you first visit Lake City, Minnesota?

A. October the 30th, 1887.

29 X Q. Had any Merrick's thread been dealt in there before you visited it?

A. I don't know; there might have been.

30 X Q. None to your personal knowledge, had there?

A. I think there was one or two merchants kept it, but I am not sure.

31 X Q. What was the thread principally dealt in there?

A. I believe Coats'.

32 X Q. Don't you know it was Coats'?

A. I couldn't say one way nor the other.

33 X Q. Did you not find Coats' thread for sale in all the stores you visited?

A. They might have had Coats'; they might have had Clark's; I didn't pay particular attention to what they had.

34 X Q. You tried to introduce Merrick's at the stores you visited, did you?

A. Yes, sir.

35 X Q. But you didn't pay particular attention to what they already had, and in place of which you wanted them to introduce Merrick's. Do you mean that?

A. I don't know what kind of thread they keep until I ask them and they tell me the kinds, or when I see their cabinets then I can tell.

1070 36 X Q. Well, when you did investigate at Lake City and saw the cabinets you found they kept Coats', didn't you?

A. I think they did; most of them.

37 X Q. How long were you there at that time?

A. About five or six hours, I should judge.

38 X Q. How many different firms did you visit?

A. Six or seven.

39 X Q. Give me the names of all of them.

A. Well, I haven't my order book here from the rest of the merchants and I don't remember them all in my head.

40 X Q. Give me all that you remember.

A. Seely & Buck, I remember *him;* Young Bros., I remember them, and I would not have remembered them only that I'd been called back there again.

41 X Q. Can't you mention any of the others?

A. No, sir.

42 X Q. By Young Brothers do you mean C. F. Young & Brother?

A. Yes, sir.

43 X Q. Did you get an order for Merrick's thread from anybody there?

A. Yes, sir.

44 X Q. From whom?

A. I sold five merchants there.

45 X Q. Can't you give me any of their names?

A. By refreshing my memory I believe I can remember two now, two more out of memory. I think one of them is Kemp and the other one is Anderson Brothers. That's all I can remember out of my head.

46 X Q. When you went to these firms in Lake City, C. F. Young & Brother, for example, what did you do to introduce the Merrick thread, did you have samples of it with you?

A. Yes, sir.

47 X Q. In what shape?

A. Had little dozen boxes with me of different sizes of Merrick's thread.

1071 48 X Q. Did you show these boxes and the spools in them to the firm of C. F. Young & Brother?

A. Yes, sir.

49 X Q. You found out from them that they dealt in Coats' thread, did you not?

A. I believe so.

50 X Q. And you compared Merrick's with Coats' to them and tried to induce them to take up Merrick's, did you not?

A. Yes, sir.

51 X Q. And told them that you thought they could sell Merrick's for Coats' if they would lay in a stock. Did you not say substantially that?

A. No, sir; not to him nor to anybody else; not to any other firms.

52 X Q. Did you not tell them you thought they could sell Merrick's if they got a stock?

A. Yes, sir.

53 X Q. And that they could sell it to their customers who were then buying Coats' of them?

A. I told them to buy the Merrick thread, and that if anybody comes in and asks for Coats' thread that they should tell them that they have Merrick's, which I proved to him was a better thread than Coats', and that he satisfied himself by testing it himself, and that he could buy our goods a trifle cheaper.

(Last part of answer objected to as irresponsible.)

54 X Q. Was there a Coats cabinet in C. F. Young & Brother's store?

A. I believe so; I couldn't say for certain.

55 X Q. Where did the Coats thread come from which you say you tested?

A. Some I had and some he took out of the cabinet. I carry every make of six-cord thread with me to test with, and then I tell them to take it out of their cabinets to satisfy themselves.

56 X Q. And did your testing machine ever fail to show that Merrick's was the strongest?

1072 A. Well, sometimes it didn't; but nineteen times out of twenty Merrick's comes out ahead.

57 X Q. On your machine?

A. On anybody's machine.

58 X Q. Question repeated.

A. I don't need a machine for that. It will prove itself by tying them together, the same number of threads, or crossing them. I can break them every time or pull their knots on my thread without a machine, which will prove the superiority of the goods for themselves.

(Answer objected to as irresponsible.)

59 X Q. Question repeated.

A. Well, I've tried 'em on several machines. It don't make any difference what machine it is, they will pull more 19 times out of 20, the Merrick's thread, our goods.

60 X Q. Did you ever hear, in the line of your business, that Merrick's thread was coarser for corresponding numbers than the other six-cord threads of the best makes, such as Coats' or Clark's?

A. I think that our main numbers run finer than the other leading makes, and that our coarse numbers are no heavier than other

leading makes and finer than some leading makes. Take it in all, they're finer than our competitors' goods.

61 X Q. Who gave you this information?

A. No one. I have sold threads for fifteen years, and my own eyes teaches me something about threads, and my experience in the trade.

62 X Q. Did you ever make any tests for fineness between corresponding numbers of Coats' and Merrick's?

A. I did, for all makes, under a microscope, as that is part of our business.

63 X Q. Do you think threads are given their numbers by being inspected through a microscope?

A. I don't know anything about the numbers, as I don't make thread.

1073 64 X Q. You don't know why a certain fineness of thread is numbered 40 or the reason for it, do you?

A. I have heard the number of strands and the sizes used on every number, but I can't remember them, and I don't think there's one salesman in a hundred who can.

65 X Q. When you made these tests at C. F. Young & Brother's you had both the Coats' and the Merrick's spools of the same numbers out together trying them, did you not?

A. Yes, sir.

66 X Q. And the members of that firm were examining the two brands of spools and talking to you about them, and you were also talking to them about them and trying to get them to give you an order for Merrick's in the line of your business, were you not?

A. Only one member of the firm; the other member was not there; they told me he was away, so one of the Youngs said; I think there was a clerk or two; I am not sure; there was one clerk I am sure of.

67 X Q. Well, my statement is correct as to those who were present, is it not?

A. As to that Mr. Young, yes.

68 X Q. Give me the names of all you remember present on that occasion; the names you know.

A. The only one of the firm that I knew was Mr. Young I didn't get no names of no clerks; there was a clerk or two near by, one I am positive of, that he was testing with.

69 X Q. You saw Charles A. Koch there on that occasion, did you not?

A. Not at that time. I saw him about 10 minutes afterward behind the desk, where he was writing, back of the store, and the testing was in front of the store.

70 X Q. Did you speak to him about introducing the Merrick thread?

A. Yes, sir.

71 X Q. And show him any of your spools?

1074 A. No, sir.

72 X Q. Did you not say to him that you thought he could use the Merrick thread together with the Coats?

A. I might have said something to that effect. I asked him how much Coats' thread he used in the year; he told me he thought he used 3,400 dozen, but wasn't quite sure; then I told him that he wouldn't be nothing out if he tried a cabinet of the Merrick thread; and I told him that Mr. Young had tested the thread and found the Merrick thread the strongest, and if he tried one cabinet of the Merrick thread to let them talk for themselves, and we could save him a little margin on the goods; that was all that was said to Koch.

73 X Q. Were you present at Lake City when Charles A. Koch gave his testimony for the complainants in this case?

A. No, sir; I was for the cross-examination.

74 X Q. Did C. F. Young & Brother give you an order for Merrick's thread?

A. No, sir.

75 X Q. Have they ever given you an order since for Merrick's thread?

A. No, sir.

76 X Q. Is mere strength of thread the only quality which determines whether one thread is better than another as between different brands of six-cord thread?

A. If they use the quality of sea island cotton—if one uses a better quality of sea island cotton than the other the strength will prove it there.

77 X Q. Are not smoothness and whiteness in the white threads and various other qualities important in deciding which is the best thread?

A. Yes, sir; but I think the Merrick's thread just as good as any, and a little better for evenness and for strength.

(All the answer after the words "Yes, sir," objected to as irresponsible.)

1075 78 X Q. Do you know any other spool except Merrick's that is like Coats' in having the raised numbers on the spool head now in the market?

A. No.

79 X Q. Coats' spools had those raised or embossed numbers on them long before Merrick's put them on spools, did they not, to your knowledge?

(This question, as well as the next previous question, is objected to as not opened by the direct, which was limited to the two points already specifically stated, and defendants' counsel further objects to the question as a further attempt to make out for the third time a *prima facie* case for complainants after having voluntarily closed the first and been ordered by the court to close the second, and defendants' counsel protests against such procedure and gives notice that he must direct the witness to decline to answer such objectionable questions unless complainants' counsel can see his way clearly to cross-examining the witness legitimately. Defendants' counsel adds that the fact of whether or not the Coats' and Merrick's spools or labels do or do not resemble each other and the fact as to which

of these two parties adopted this or that feature of spool or label first has not been touched upon in the direct examination — this witness, and these subjects of testimony as well as all others, except the two specifically mentioned, have been omitted from the testimony of this witness in order that a conclusion of this Chicago testimony might be reached and counsel be relieved and be able to reach his business in New York as well as for other good reasons.

Complainants' counsel criticises the statements of fact in above objection as inaccurate, and says he could have finished his cross-examination in less time than it took to make the objection.)

1076 A. I couldn't say one way nor the other; it might have been or it might not.

80 X Q. Did you see those raised numbers on Coats' spools before you ever saw them on Merrick's?

(Question objected to for the reasons stated after question 79, Cross-Q., and states that if the court were accessible here he should not hesitate to instruct the witness to decline to answer until instructed by the court to do so.)

A. I didn't see every kind of thread that was made and I haven't seen every kind of thread yet.

81 X Q. Question repeated.

A. I haven't seen it; they might have been in the market, though, for all that.

82 X Q. Don't those raised numbers make Coats' and Merrick's spools on their upper heads where the numbers are look very much alike?

(Same objection and remarks, and complainants' counsel is notified, furthermore, that he must consider the witness as his own and that he will be held to be responsible for the answers made as if made by his own witness.

Complainants' counsel refers to direct questions No. 3, 4, and 5 and considers the above question strictly cross-examination.)

A. No, sir; because it's the name that sells the goods; the word Merrick's is different from the word Coats'.

83 X Q. But the raised numbers on Merrick's spools make them look very — like Coats' outside the paper label, don't they?

(Same objection, remarks, and notice.)

A. All spools look alike, and it's the name that they go by, not by the spools.

84 X Q. If the paper label of a Merrick No. 40 spool and a Coats No. 40 spool on the end where the embossed numbers are
1077 have both come off by some accident does not the Merrick upper spool head look almost exactly like the Coats upper spool head?

(Question objected to by defendants' counsel for the same reasons as heretofore, and the same remarks may be considered as made and the same notice given; and the question is further objected to be-

cause the use of the term upper spool head is ambiguous for the reason that either end or neither end may be upper, according to the way the spool is placed, and there is no authority for considering one end upper in preference to the other. Both ends have labels; and for the further reason that defendants' counsel, from the very outset of this cause, objected to complainants' method of endeavoring to show infringement of the trade-mark claimed to be infringed in this controversy by sawing or cutting off one end of the spools and introducing them as exhibits in this case and questioning witnesses concerning them, and other partial exhibitions of the article of thread as a whole.

Complainants' counsel criticises the above objection, first, if intended as testimony, as improper; second, if intended to prompt the witness, as unwarranted, and, in any event, as unnecessary.)

A. Not exactly, and it looks somewhat alike, but the Merrick's spool is a thinner spool than the Coats'—that is, a longer spool than the Coats'; in my opinion any one can detect one from the other, if they choose to.

85 X Q. Which is the upper end of a spool as recognized in the trade?

(Same objection, remarks, and notice.)

A. The end where the name's on.

86 X Q. In a six-cord Merrick's spool or Coats' spool which end would the upper end be?

1078 A. I just stated before; the end which the name would have on the label would be the upper.

87 X Q. Do you mean the black and gilt label would be the upper end?

A. Yes, sir.

88 X Q. You have come here to testify at the request of the Merrick Thread Company, have you?

A. Yes.

89 X Q. And the testimony of Mr. Young and Mr. Koch was heard or read by you before you began your testimony here?

A. No, sir; excepting Lake City; when I was out there I heard it.

And, being further examined by Mr. WITTER, the witness further says:

90 R. D. Q. The Coats spools have the name Coats on both ends, have they not—that is, on a black and gold label on one end and on the black and white label on the other end, don't they?

A. Yes, sir.

91 R. D. Q. And when the spool is placed so that the black and white label is highest that's the upper end of that spool, isn't it?

(Objected to as seeking to make the witness directly contradict previous testimony.)

A. Yes, sir.

92 R. D. Q. Is either end uppermost in the dozen boxes?

(Same objection.)

A. No, sir.

93 R. D. Q. Do you mean anything more by speaking of the black and gold labeled end as the upper end except that in the long run that end of the spool is probably uppermost oftener than the other end?

(Same objection.)

A. There's very seldom a cabinet of any kind of thread
1079 that you don't find almost as many with one end up as with the other.

And, being examined by Mr. BETTS, witness says:

94 R. X Q. What is on what I have called the bottom end of the Merrick spool?

A. I believe—I am not certain—but it says Merrick's standard six-cord-thread, and that's my impression of our bottom end; I might be mistaken, as I didn't watch all the labels so close of all the brands of thread.

95 R. X Q. What is on the black and gilt label of the Merrick spool?

A. Merrick's six-cord thread, I believe, and a big star in the center, and I think it says "for hand or machine;" no; I think that's all; I'll not be positive on that.

And, being further examined by Mr. WITTER, the witness says:

69 R. X Q. The end that is usually looked at to determine whose thread the spool is is the black and gold labeled end, is it not?

A. Most always.

HARRY PHILLIPS.

Subscribed and sworn to before me this 6th day of March, A. D. 1888.

[L. S.] HENRY W. PROUTY,
Notary Public.

Adjourned to 11 o'clock Wednesday morning.

1080 PALMER HOUSE, CHICAGO, ILL., *March* 7, 1888—11 a. m.

Parties met pursuant to adjournment.

Present: Counsel as before.

LOIS HART, a witness of lawful age, produced on the part of the defendants, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by W. C. WITTER, Esq., counsl for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Lois Hart; age, 37 years; residence, 1662 Milwaukee avenue; occupation, notion store.

2 Q. What is your husband's name?

A. W. T. Hart.

3 Q. What spool thread, if any, have you kept and sold at that store?

A. Merrick's thread.

4 Q. Any other?

A. No, sir.

5 Q. Besides attending store what do you do?

A. I attend to my household duties and the hall upstairs—the public hall.

6 Q. Do you employ any household servants?

A. No, sir.

7 Q. State whether other thread than Merrick's has been ever asked for at your store.

A. Yes; once in awhile it has.

8 Q. How do you meet such a request?

A. I tell them I keep none but Merrick's.

9 Q. Where do you keep your thread?

A. In a cabinet case on the counter in the store and in the boxes on the shelf.

10 Q. What cabinet is it?

A. Merrick's cabinet.

11 Q. And what boxes?

A. Merrick's boxes.

1081 12 Q. When spool thread or Merrick's spool thread is asked for, just relate how you serve the customer when you are attending store.

A. I open the drawer or the box and just tell them to help themselves.

13 Q. Please tell us why that is your practice instead of yourself handing the spools to the customer.

A. Because we have a public hall upstairs, and I have the sweeping and dusting and all the work to do, and I cannot keep the customers waiting while I go to wash my hands, so I open the drawer or the box and tell them to take it. They usually have a number of parties when the societies meet upstairs.

14 Q. And do you attend to the preparations for these parties and to the washing up and taking care of the utensils and dishes used in addition to your regular household duties?

A. Yes, sir.

15 Q. What is your practice as to wrapping up thread that is asked for? How often does it happen that the thread is wrapped up?

A. I never wrap it up. I just have some pieces of paper lying on the counter if they wish it wrapped up; otherwise I let them take it as it is.

16 Q. In such case who wraps it up—you or the customer?

A. The customer.

17 Q. Is it often or seldom that a customer wants it wrapped up?

A. Very seldom; hardly ever.

18 Q. You say that you open the drawer of the Merrick cabinet or hand the customer a box of Merrick's thread for them to help

themselves. When thread simply or Merrick's thread is called for do you thus hand them any other box than the well-known Merrick's one-dozen box?

A. I have no other.

19 Q. How is spool thread known and asked for when the customer wants any particular kind?

A. Merrick's thread.

1082 20 Q. Where was your husband for, say, two weeks or more before Christmas last?

A. He was home part of the time and part of the time over at our other house, on Powel avenue.

21 Q. Did you ever sell anybody Merrick's thread when they asked for Coats' without their knowing what they got?

A. No, sir.

22 Q. Do you remember two women, strangers to you, going into your store to buy thread or for any other purpose, say in December last at any time?

A. I don't remember any such ladies.

23 Q. If they had done so would you be likely to remember it? And, if you would do so, state why.

A. I don't remember. I don't think there were such people. I would be likely to remember it, because I know most of the customers who come into my store. I am familiar with them.

And, being cross-examined by SAMUEL R. BETTS, Esq., counsel for complainant-, deposes and says as follows:

24 X Q. How long have you sold Merrick's thread at your store?

A. I have been in the store a little over a year, but I don't exactly remember just when I commenced to sell the thread.

25 X Q. In last December, 1887, did you have any thread besides Merrick's in stock?

A. No, sir; I never had any other.

26 X Q. Then, if two ladies got any thread at your store between the 12th and 18th of last December, it must have been Merrick's. Is that so?

A. Yes, sir.

27 X Q. Do you have inquiry for Coats' thread sometimes?

A. Sometimes.

28 X Q. Do you remember if you had any inquiries for Coats' thread last December, 1887?

A. I don't remember any.

29 X Q. At what price do you sell Merrick's thread?

1083 A. Five cents a spool.

30 X Q. Do you not have strangers coming in and buying at your store occasionally?

A. Not very often.

31 X Q. But you do occasionally, don't you?

A. Yes, occasionally; because there are people moving back and forth all the time. The people who own the houses on either side rent them out. Sometimes they move out for two or three months and let them to some one else.

32 X Q. If any lady had come into your store last December and asked for Coats' thread you had nothing to give her but Merrick's, had you?

A. No, sir.

33 X Q. So if you gave her any spools in answer to her inquiry for thread they must have been Merrick's spools. Is that not true?

A. Yes, sir.

34 X Q. Was anybody else except your husband and yourself attending to customers at your store at any time during last December?

A. I don't remember about any one.

35 X Q. Suppose your husband were out at work and you were called out of the store for some reason to attend to the hall or something else, who looked after the store?

A. I would attend it, because the door leading up into the hall opens into the store. I have a little dog that's always down there; also a little boy four years old. He calls me down if any one comes in.

36 X Q. You don't mean to be understood that you never hand goods, including spool cotton, to customers yourself when they buy, do you?

A. Oh, I do it sometimes, if it happens in the evening when I've done and through my work.

37 X Q. And you sometimes wrap up spools for customers, don't you?

A. No, sir.

38 X Q. You would if they asked you to, would you not?

A. Yes, sir.

1084 39 X Q. Your sales are mostly one or two spools at a time, I suppose?

A. Yes, sir.

40 X Q. Do you frequently sell spools of thread to children?

A. Yes, sir.

41 X Q. Do you ever keep any of your spools in plain white boxes or boxes without a spool-thread label on them?

A. No, sir; they are all labeled.

42 X Q. Have you any recollection of two women, strangers to you, buying thread at your store about the middle of last December?

A. None at all.

43 X Q. Or what they asked for if they did buy any thread? Do you remember that?

A. Sir?

44 X Q. Question repeated.

A. No, sir.

45 X Q. From where do you generally sell thread? Is it from behind the counter?

A. The boxes are behind the counter, but the case is on the counter.

46 X Q. When you sell thread or other articles do you generally go behind the counter and make the sale from there?

A. Yes, sir; except it's a spool of thread. Then I don't go behind the counter because the case is right on it.

LOIS HART.

Subscribed and sworn to before me this 7th day of March, A. D. 1888.

[L. S.] HENRY W. PROUTY,
Notary Public.

Examination adjourned until 2.30 p. m.

Examination further adjourned until 10 a. m. March 8, 1888; same place.

1085 PALMER HOUSE,
CHICAGO, ILLINOIS, *March* 8, 1888—10 o'clock a. m.

Parties met pursuant to adjournment.

Present: Counsel as before.

ALEXANDER PATON, a witness of lawful age, produced on the part of the defendant-, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by W. C. WITTER, Esq., counsel for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Alexander Paton; age, 39 years; residence, Shelby, Michigan; occupation, merchant and miller.

2 Q. Who is your partner and what is the name of your firm?

A. My partner is Harry L. Andrus; firm name is Paton & Andrus.

3 Q. State what spool threads, if any, you sell at your store in Shelby, Michigan.

A. We did sell Coats', Clark's, Merrick's, Willimantic. We are out of business now at Shelby, Michigan. We sold out last week. We are now doing business at New Era, Michigan.

4 Q. How long did your firm do merchandizing business at Shelby and sell six-cord thread?

A. Five years and a half or in that neighborhood.

5 Q. What thread do you sell at New Era?

A. We sell Clark's, Coats', and Merrick's.

6 Q. Of which do you sell the most?

A. Coats'.

7 Q. When was the first time that you remember anything being said to you or by you touching the similarity or dissimilarity of the Coats' and the Merrick's spools or labels?

A. The first time I remember was some time near New Year's of the present year.

1086 8 Q. Who was it that was present at that time?

A. Mr. Howard, an agent of the Merrick Thread Co.

9 Q. State what reason, if any, you have ever given for putting in a stock of or dealing in the Merrick spool cotton.

A. Because we could make more money on it, on selling it.

10 Q. Did you ever give any other reason to any person?

A. No, sir.

11 Q. Do you remember ever having any conversation with John B. Crosby on the subject of the similarity or dissimilarity of the Merrick and Coats thread or spools or labels?

A. Yes, sir.

12 Q. Was it since the time when you saw Mr. Howard, as above mentioned?

A. Yes, sir.

13 Q. State whether he at that time in substance stated that he was perhaps mistaken in what he had testified to in New York on that subject.

(Objected to as incompetent and calling for hearsay; also as leading.)

A. He said something like this: that he might have had a wrong idea in what he had said when he claimed he had had a talk with us before. That's as near as I can remember just what was said, but he said, perhaps, he had misunderstood what had been said in that talk.

14 Q. Please state what you just said in answer to the above question in addition to what the examiner has written.

(Same objections.)

A. I said that I did not remember of ever having any talk with John Crosby in regard to the Merrick thread previous to this last talk that I have been telling about.

1087 15 Q. Subsequently to your talk with Mr. Howard, the Merrick agent, did you make an affidavit at his request?

(Objected to as immaterial.)

A. Yes, sir.

16 Q. Look at the paper now produced and state whether that is the affidavit you then made and whether that is your signature.

(Objected to as incompetent and immaterial.)

A. Yes, sir.

Defendants' counsel puts the said affidavit in evidence, and it is marked "Defendants' Exhibit No. 66, Paton Affidavit."

(Objected to as incompetent and immaterial.)

Defendants' counsel requests the examiner to copy the said affidavit at this point.

(Objected to as incompetent and immaterial and because it is not made any part of the testimony of the witness by being copied into the record at the request of defendants' counsel.)

The examiner copies the affidavit as follows:

1088 Alex. Paton. H. L. Andrus.

Offices of Paton & Andrus, dealers in general merchandise, pine, oak, and hemlock lumber; saw-mill at New Era.

SHELBY, MICH., —— --, 188-.

U. S. Circuit Court, Southern District of New York.

COATS *et al.*
v.
MERRICK'S THREAD CO. *et al.* } In Equity.

STATE OF MICHIGAN, }
County of Oceana. }

Alexander Paton, being duly sworn, deposes and says as follows: I am a member of the firm of Paton & Andrus, doing business at Shelby, Michigan; I have never stated to any person that I bought or sold Merrick's thread because it looked so nearly like Coats' thread that our customers would not notice the difference.

ALEX. PATON.

Subscribed and sworn to before me this 17th day of January, A. D. 1888.

FRANK W. NEWMAN,
Notary Public, Oceana Co., Mich.

And, being cross-examined by SAMUEL R. BETTS, Esq., counsel for complainants, deposes and says as follows:

17 X Q. How long have you known John B. Crosby, whom you refer to in your testimony?

A. Between five and six years.

18 X Q. How long ago did you first see him at your store in Shelby, Michigan?

A. I think it was over five years ago.

1089 19 X Q. And has he been in there at intervals since then?

A. Yes; he traveled for about three years; since then he has been in the house of Root, Strong & Co., of Detroit.

20 X Q. On what business did he come into your store at Shelby?

A. To sell us dry goods and notions.

21 X Q. Representing what firm?

A. First Charles Root & Co., later Root, Strong & Co.

22 X Q. Was spool cotton among the goods that he tried to sell you?

A. Yes; he sold spool cotton.

23 X Q. How long have you been selling Coats' thread?

A. Nearly five years and a half.

24 X Q. How long has your firm been Paton & Andrus?

A. Nearly five years and a half.

25 X Q. How long have you been selling Merrick's thread?

A. I think it was about four years ago that we first bought it.

26 X Q. Whom did you first buy it from?

A. I think it was Mr. Howard here, the agent of the Merrick Thread Co., but I wouldn't be sure.

27 X Q. It may have been less than four years ago when you first got Merrick's thread, may it not?

A. Yes; it may be less; I wouldn't swear to the exact date.

28 X Q. Do you buy Merrick's cheaper than you buy Coats'?

A. Yes, sir.

29 X Q. And at what price per spool do you sell it?

A. Five cents.

30 X Q. The same price as Coats'?

A. Yes, sir.

31 X Q. Do you remember Mr. Crosby being in your store
1090 and what was said the first time he came in there after you had put Merrick's thread in stock?

A. I do not remember anything in particular being said about Merrick's thread.

32 X Q. Can you tell me how long after you put in Merrick's thread it was that he next came into your store at Shelby?

A. I couldn't tell from memory the particular time; but he called every sixty days; it was either sixty or ninety, I could not be sure which.

33 X Q. Then you don't remember what he said or what you said, if anything, in regard to Merrick's thread the first time he saw it in your store?

A. No; I do not; I don't remember ever talking anything about it; I may have done so, but I don't remember.

34 X Q. What has been the leading thread, so far as your sales show it, in your section of the country?

A. Coats'.

35 X Q. Does it not help in introducing the Merrick thread to your customers that the spools (I refer especially to the ends which have the raised numbers) bear a close resemblance in appearance to the Coats spools?

(Question objected to as containing a statement which is unwarranted by the testimony.)

A. I don't know that it does.

36 X Q. Do not the Merrick spools bear a closer resemblance to Coats', in your opinion, than any other spools do?

(Objected to as an attempt on the part of complainants' counsel to make out a third *prima facie* case after having closed the first voluntarily and after having closed the second by order of court.)

(Complainants' counsel objects to the above statement of facts as incorrect.)

1091 A. I couldn't say; I'm not a judge; I never saw the other kinds of spools—all the other kinds of spools.

37 X Q. How is it among the spools that you have seen?

(Same objections.)

A. It may have a somewhat closer resemblance than some others.

38 X Q. Don't you think that the Merrick spools, in fact, look so much like Coats' that customers would not be apt to notice the difference unless they read the names on the labels?

(Same objections.)

A. I don't know as they would any more than they would with Clark's—some of Clark's; part of Clark's are black spools.

39 X Q. Clark's spools have not the raised numbers around the spool heads, have they?

(Same objection.)

A. I believe not; I never saw a customer yet speak about those raised numbers; they always look at the name printed on the label.

(Last part of answer objected to as irresponsive.)

40 X Q. You would not testify that John B. Crosby never had a conversation with you in which the similarity or the dissimilarity of the Merrick's and Coats' spools and labels was referred to before the present year 1888, in view of his testimony, would you?

A. What was his testimony? I don't know that is within my view; I would not swear to that; but I can't remember what may have been said five or six years ago—four or five years ago; I don't remember saying anything to him about it.

41 X Q. Do you mean to be understood that John B. Crosby said to you since you have seen Mr. Howard, the Merrick agent,
1092 about this matter that his sworn testimony in New York city in this case was untrue?

A. I mean to say that I told John B. Crosby, when I last saw him, that I never remembered of having a talk with him in regard to Merrick's thread, and that if I ever had had a talk he had a misconception of that talk, or a misconstruction, whatever you are a mind to call it, and he said that it was probable that he had misunderstood what I had said.

42 X Q. When did you first hear that you would be called on to testify in this case?

A. The first time I knew they had any trouble, that our names were mentioned in it, was near the beginning of this year.

43 X Q. From whom did you learn this?

A. From Mr. Howard, the agent of the Merrick Thread Co.

44 X Q. Do you mean Mr. Howard, who is now here present?

A. Yes, sir.

45 X Q. Was that the time when you made the affidavit sworn to January 17, 1888?

A. No; I think it was about three weeks before that.

46 X Q. Who got you to make the affidavit?

A. Mr. Howard requested me to make it.

47 X Q. When next did you have anything more about this testimony?

A. Yesterday, at 10 o'clock, Mr. Howard called on me and asked me to come down to Chicago to testify.

48 X Q. How often, as near as you can state, has John B. Crosby been into your store in Shelby since you first put Merrick's thread in stock?

A. I think about ten or twelve times.

49 X Q. And on each occasion have you had a talk with him?

A. Certainly.

50 X Q. Do you buy any thread except Coats' from him?

1093 A. We have ordered Coats' thread from him and they have sent other thread in its place as a substitute.

51 X Q. Have you ever ordered anything but Coats' from him?

A. I think not.

ALEXANDER PATON.

Subscribed and sworn to before me this 8th day of March, A. D. 1888.

[L. S.] HENRY W. PROUTY,
Notary Public.

HARRY L. ANDRUS, a witness of lawful age produced on the part of the defendants, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by W. C. WITTER, Esq., counsel for defendants, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Harry L. Andrus; age, 30 years; residence, Shelby, Mich.; occupation, merchant.

2 Q. What is your firm's name?

A. Paton & Andrus.

3 Q. How long has your firm sold Coats' thread?

A. Since September, 1882.

4 Q. Have you ever, at any time, had any conversation with John B. Crosby, of Root, Strong & Co., in which the question of similarity or dissimilarity of Coats' and Merrick's thread was alluded to in any way?

A. I believe not.

5 Q. If you had had any such conversation, do you think you would be likely to remember it?

(Objected to as incompetent and leading.)

1094 A. I think so; yes.

6 Q. Why did you put in Merrick's thread and why are you dealing in it?

A. We put the thread in to sell and deal in it to make a profit.

7 Q. And you make a little better profit on the Merrick's thread than you do on the combination threads, do you not?

A. Yes, sir.

8 Q. Did you ever give any other reason to any person for putting in Merrick's thread or dealing in it than that it was more profitable to you?

(Objected to as leading.)

A. I believe not.

And being cross-examined by SAMUEL R. BETTS, Esq., counsel for complainants, deposes and says as follows:

9 X Q. How long have you known John B. Crosby, who formerly traveled for Root, Strong & Co. in your section of the country?

A. Five years or more.

10 X Q. When did your firm first put Merrick's thread in stock?

A. I couldn't say. I think between three and four years ago.

11 X Q. About how long had you been selling Coats' thread before you began to sell Merrick's?

A. Well, we have kept Coats' thread in stock since we commenced doing business; it was, perhaps, two or three years before we put Merrick's thread in stock.

12 X Q. Do you remember the first time that John B. Crosby was in your store after you put Merrick's thread in stock?

A. I do not.

13 X Q. Or what was said by you or by him on that occasion?

A. I have no recollection of what was said.

14 X Q. About how often have you seen Crosby in your store since you put in Merrick's thread?

1095 A. I think about once in sixty days; I don't think he has been there within two years.

15 X Q. How have you kept your Merrick's thread in the store?

A. In the case.

16 X Q. What do you mean by "the case"?

A. I mean the case which the company sent; the case which contained the thread when it was shipped to us—the cabinet.

17 X Q. Was it Merrick's cabinet with their name upon it?

A. Yes, sir.

18 X Q. Where did it stand in the store when you first got it?

A. We placed it on the counter on the north side of the store.

19 X Q. Was it where anybody coming into the store, as Mr. Crosby did, would be likely to see it?

A. Yes, sir.

20 X Q. You buy Merrick's thread cheaper than Coats' and sell it at the same price, as I understand you; is that so?

A. Yes, sir.

20 X Q. Was Mr. Crosby the only person who sold you thread at the time he was visiting your store, or did you buy it from other agents also?

A. We bought thread from different jobbers; from different agents.

22 X Q. Did Mr. Crosby sell you your Coats thread?

A. I believe we bought some Coats thread of him; not all of it.

23 X Q. You did not buy any thread except Coats' thread from him, did you?

A. I think we did; I think I remember buying a cabinet of Clark's thread from Mr. Crosby.

24 X Q. But he sold you mostly Coats', did he not?

A. Mostly, yes, sir; we used to order Coats' thread from him, sometimes getting other thread substituted.

1096 25 X Q. He never sold you any Merrick's thread, did he?

A. No, sir.

26 X Q. Does your concern sell thread mostly in small quantities, a spool or two at a time?

A. Yes, sir; I frequently sell a dozen, though, at a time or more.

27 X Q. Which is the leading thread in your section of the country?

A. I think Coats' is.

28 X Q. Do you sell thread occasionally to children who are sent to the store for it?

A. Yes, sir.

29 X Q. Do not the Merrick's spools, in your opinion, bear a close resemblance to the Coats spools (I refer particularly to the ends which have the raised numbers on them)?

(Same objection as to cross-question 36 of the deposition of Alexander Paxton.)

A. I think they do.

30 X Q. Suppose the customers could not read or did not read the name on the label, would they not be liable to mistake Coats' spools for Merrick's or Merrick's for Coats'?

(Same objection.)

A. I think if they would observe the spools closely they would see a difference, although such mistakes might occur.

31 X Q. Don't you think it helps the sale of Merrick's spools and makes customers more ready to take them when you recommend the Merrick's thread that the spools bear such a close resemblance to the longer established brand of Coats', which you have said is the leading brand in your section?

(Same objection.)

A. That hasn't been my experience; we usually give the customer his choice of thread.

1097 32 X Q. Will you swear that you never remarked on the similarity of the Coats' and the Merrick's spools to Mr. John B. Crosby in any way before January, 1888?

A. I will; yes, sir. I never observed the resemblance closely until Mr. Howard called there about the first of January; I never examined the spools together closely to see what the difference was until that time when Mr. Howard was there.

33 X Q. Did you ever hear a customer or anybody else remark on the similarity of Coats' and Merrick's spools prior to your interview with Mr. Howard?

(Same objection.)

A. Not to my recollection.

34 X Q. You have noticed the raised numbers on the Merrick's spools as being like those on the Coats' spools, have you not?

(Same objection.)

A. No, sir; I know they both have raised numbers; I have also noticed the difference in the way they are put on the spool.

35 X Q. For how long a time have you noticed that they both have raised numbers?

A. The first time I remember observing that fact was somewhere about the first of January, when Mr. Howard called my attention to it.

36 X Q. When did you first hear you would be asked to testify in this case?

A. Yesterday forenoon between 10 and 11 o'clock, I think.

37 X Q. Did not Mr. Howard speak to you about giving testimony in this case some time ago?

A. He produced an affidavit, which I swore to some time in January; that was all.

38 X Q. When was that?

A. About the middle of January.

1098 39 X Q. Was it the same day that Mr. Paton swore to his affidavit?

A. Yes, sir.

40 X Q. Had Mr. Howard seen you before that in regard to the testimony that Mr. Crosby gave?

A. Yes, sir.

41 X Q. When was that?

A. I think about New Year's he was there.

42 X Q. And what was said then on the subject?

A. Why, he merely said there was litigation between these two thread companies, and he asked me if I would sign an affidavit to the effect that I had never sold Merrick's thread representing it to be Coats' or that customers—so that customers would think it was Coats' thread. He afterwards told me that some witness had testified that he could sell Merrick's as well as Coats' on account of customers not knowing the difference from the looks of the spools or thread.

43 X Q. Did you sign the affidavit which he presented to you?

A. I did.

44 X Q. And Mr. Howard yesterday requested you to come down here and testify, did he?

A. Yes, sir.

And, being further examined by W. C. WITTER, Esq., counsel for defendants, he deposes and says as follows:

45 R. D. Q. Look at the paper now handed you and state whether it is the affidavit to which you have referred in your cross-examination.

(Objected to as incompetent and immaterial.)

A. It is the same; yes, sir.

(Defendants' counsel puts said affidavit in evidence, and it is marked Defendants' Exhibit No. 67, Andrus Affidavit.

1099 Objected to as incompetent and immaterial.

Defendant-' counsel requests the examiner to copy the said affidavit into the record.

Objected to as incompetent and immaterial, and because it cannot be made a part of the testimony of this witness by being copied into the record at the request of defendants' counsel.)

U. S. Circuit Court, Southern District of New York.

COATS *et al.*
v.
MERRICK THREAD CO. *et al.* } In Equity.

STATE OF MICHIGAN, }
County of Oceana. }

Harry L. Andrus, being duly sworn, deposes and says as follows: I am a member of the firm of Paton & Andrus, doing business at Shelby, Michigan. I have never stated to any person at any time that the Merrick thread looked so much like Coats' that our customers would not notice the difference, and I never have made any remark or statement that would bear any such construction.

HARRY L. ANDRUS.

Subscribed and sworn to before me this 16th day of January, 1888.

FRANK W. NEWMAN,
[SEAL.] *Notary Public in and for Oceana County, Mich.*

1100 46 R. D. Q. In answer to cross-questions 23, 24, and 25 you say that you have sometimes had other thread substituted when you ordered Coats' of Mr. Crosby, and you also say that he never sold you any Merrick's thread; what were the threads that he substituted for Coats'?

A. I didn't intend to say threads; it was Willimantic thread that was substituted.

HARRY L. ANDRUS.

Subscribed and sworn to before me this 8th day of March, A. D. 1888.

HENRY W. PROUTY,
[SEAL.] *Notary Public.*

Further examination adjourned to 32 Park place, New York, at 12 o'clock on Saturday, March 10, 1888.

UNITED STATES OF AMERICA, }
State of Illinois, Cook County, } *ss:*

I, Henry W. Prouty, a notary public in and for the county of Cook and State of Illinois, do hereby certify that on the first day of

March, A. D. 1888, and on subsequent days, all pursuant to notice and adjournments, personally appeared before me, at the Palmer house, in the city of Chicago, in the county and State aforesaid, Otto C. Fischer, Jesse T. Seeley, Pierre V. Root, Emma G. Jacklin, Caroline Jacklin, Mary Abraham, William T. Hart, Harry Phillips, Lois Hart, Alexander Paton, and Harry L. Andrus, witnesses, to testify on behalf of the defendants in a certain cause now pending in the circuit court of the United States for the southern district of New York wherein Sir Peter Coats *et al.* are the complainants and The Merrick Thread Company *et al.* are the defendants.

And I do further certify that the aforesaid witnesses were first duly cautioned and sworn by me to testify the truth, the
1101 whole truth, and nothing but the truth in relation to the matter in controversy in the cause aforesaid, so far as they should be interrogated, and that the testimony of said witnesses was by me or under my supervision reduced to writing and first carefully read to said witnesses and the same subscribed to by said witnesses in my presence.

And I do further certify that the above and foregoing original depositions of said witnesses were, by consent of Samuel R. Betts, Esq., counsel for said complainants, delivered by me at the close of this examination into the custody of W. C. Witter, Esq., counsel for said defendants, instead of being filed by me.

And I do hereby further certify that I am not of counsel nor attorney for either of the parties in the said depositions and caption named nor in any way interested in the event of the cause named in the said deposition-.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 8th day of March, A. D. 1888.

HENRY W. PROUTY,
[SEAL.] *Notary Public.*

NEW YORK, *March* 14, 1888—11 a. m.

Parties met pursuant to adjournment.

Present: W. C. Witter, Esq., counsel for defendants, and Samuel R. Betts, Esq., counsel for complainants.

L. R. HOPKINS, a witness recalled on behalf of the defendants, deposes and says:

1 Q. State whether since the defendants closed their proofs in answer to complainants' first *prima facia* case and since the
1102 time when complainants began to put in their second *prima facia* case you have, in answer to this second case, made further investigations and discoveries as to the belief of the consumers of 200-yard six-cord spool thread in the United States and of the trade that Coats' 200-yard six-cord thread in numbers higher than 100 is six-cord; if so, state what investigations and discoveries you have made, mentioning some of the grounds and reasons for this belief.

(Objected to as incompetent and calling for hearsay.)

A. I have made inquiries in the trade of those dealing in Coats' 200-yard spool cotton, and they pretty much universally said to me that — have always believed that it was six-cord in all numbers. I have asked those who have used those fine numbers, finer than 100, and they told me that they always supposed it was six-cord. I have also noticed the change there has been made on the advertisements on the flap of the Coats boxes of 200-yard thread in all their numbers, reading now "Coats' best six-cord, white and black, 8 to 100," while previously it read "8 to 200." I have noticed that they have made a change in their assortment list since the case commenced, stating that their thread is 8 to 100 instead of 8 to 200, as previously. These changes in the assortment list are shown in the assortment list which I here produce. I also produce boxes of their 200-yard thread in numbers higher than 100 which are marked six-cord on the top of the boxes and on the bottom, and also have their well-known symbol, which is their trade-mark for the best six-cord for the United States, both on the top and bottom of the boxes.

2 Q. What numbers of Coats' 200-yard thread in numbers finer than 100 have you found with the boxes marked with the numbers above stated since the time mentioned in Q. 1?

A. 110, 130, 140.

1103 (Defendants' counsel offers the said three boxes in evidence, and they are marked "Defendants' Exhibit No. 68, No. 110 Coats', W. H. K., notary;" "Defendants' Exhibit No. 69, 130 Coats', W. H. K., notary," and "Defendant's Exhibit No. 70, 140 Coats', W. H. K., notary.")

3 Q. Please look at Defendants' Lake City Exhibits No. 1 and No. 2 and state whether they are examples of flaps from Coats' boxes of 200-yard thread which show the change that has been recently made in the flaps, as stated by you in answer to Q. 1.

(Objected to as not in answer to complainants' last proofs.)

A. Yes, sir; they are.

4 Q. State whether since the time referred to in Q. 1 you have found at many places on sale Coats' 200-yard thread with flaps of both kinds, as represented by these exhibits.

(Same objection.)

A. Yes, sir; I have. Their older stock reads from 8 to 200 and their newer stock 8 to 100.

(Defendants' counsel offers in evidence "assortment list" referred to by witness in answer to Q. 1, and it is marked "Defendants' Exhibit No. 71, Coats' Recent Assortment List.")

(Same objection, and also as immaterial.)

5 Q. State whether other members of the combination have made certain changes in the same direction as the above and which more particularly appear in testimony already taken.

(Objected to as immaterial and as not in answer to complainants' last testimony.)

1104 A. I notice that the Willimantic Co. have changed their labels on their fine numbers above 100 so as to read on the cover of the box "superior sewing-machine thread" instead of "superior six-cord machine thread," as illustrated in the two boxes which I now produce.

(Defendants' counsel offers the two boxes of Willimantic thread, and they are marked respectively "Defendants' Exhibit No. 72, Willimantic 110, Recent Box, W. H. K., notary," and "Defendants' Exhibit No. 73, Willimantic Older Box, W. H. K., notary.")

(Same objection as to question 5.)

6 Q. State what the manufacturers of this thread have for many years each desired the public to understand as to whether their thread is or is not six-cord and as to which is six-cord in the highest numbers and as to the strife on this subject and as to whether the advance has been gradual.

(Objected to as incompetent and immaterial.)

A. There has been a constant strife to see which man of the manufacturers could make the highest numbers in six-cord. First it was only made six-cord up to number 40; from that it was advanced to 60; from that it was advanced to 80, and as machinery became more perfect it was then advanced to No. 100. Since then the Merrick Thread Co. have advanced up to 140. The firms that could and did manufacture the finest numbers of six-cord or so represented in the market have always had an advantage, other things being equal, in the price of their thread or the quantity sold.

7 Q. What classes or kinds of damage to others and of profit to the Coats people have flowed and continue to flow from complainants' false representations that their 200-yard thread in numbers higher than 100 is six-cord thread?

(Objected to as leading and not justified by the testimony of the case.)

1105 A. The damage to those who are consumers of the thread is that if they had known that it was three-cord instead of six cords, as it was advertised, they would have bought it for one-half the price. The profits to the Coats people in the first place is that they get a six-cord price for a three-cord thread in all of those fine numbers, and also that it helps the sale and enables them to get a better price for their whole line of 200-yard thread. The public would naturally suppose that if Coats could manufacture those finest numbers, six-cord, that necessarily their whole line must be better than others. Rival manufacturers who did not so advertise would not stand in so good a position in respect to the sale of their thread.

8 Q. Will you state how Coats' 200-yard thread bought at the prices at which it is generally sold, as appears in this cause, can be retailed at four cents a spool and leave the retailer a profit?

A. The price of Coats' spool cotton in the market, if a person buys 1,000 dozen in six months, is 55 cents less six and then nine per cent., which brings it below 47 cents a dozen, and at 4 cents a spool it would be 48 cents a dozen.

9 Q. What is the proportion of black and colored 200-yard six-cord thread sold to the white 200-yard six-cord thread?

A. It is just about one-half—that is to say, there is as much black and colored cotton sold as white; the quantities are just about equal.

10 Q. What is the character of the houses of Le Boutillier Bros., 48 East 14th street, and the Bee Hive, in Chicago, where, as appears by testimony herein, the Coats' and Clark's 200-yard six-cord thread is sold at 4 cents a spool?

A. They are very large retail stores, among the largest in those two cities.

11 Q. Complainants' counsel has endeavored to show by several questions to witnesses that if the black and gold label were lost from the Coats and the Merrick spools that end of the articles
1106 would resemble each other closely. If the black and gold labels were lost off the Willimantic and John Clark, Jr., white thread how could one be told from the other without examining the other ends of the spools?

(Objected to as immaterial.)

A. They could not be told the one from the other. They both being of the same size in the same number and both black, they could not be told apart.

12 Q. Please answer the same question as to the Willimantic, John Clark, Geo. Clark, Kerr, Williston, Hadley, and others in black and colored thread.

(Objected to as immaterial.)

A. In the Geo. Clark, the John Clark, Jr., and the Willimantic, which spools are all of the same size for the same numbers, if those tickets were off I think no one could tell the one from the other. In the other threads mentioned in the question they would be the same unless they are a little different shape or size spool.

13 Q. Please answer the same question as to the Orrs and McNaught, the J. J. Clark, and the Coats thread during the time prior to 1874, when Coats added the number to the ornamental embossment previously used by them.

(Objected to as immaterial.)

A. No one could have told the difference if the ticket had been off of them.

14 Q. Now, under the same circumstances how are Merrick's and Coats' distinguishable without looking at the other end?

A. In the first place the Merrick spool is considerably longer; the figures are put on in a different manner, reading from the top of the

spool, whereas the Coats' read from the bottom side, and there
1107 is nothing between the figures except the star, which we have always used, whereas in the Coats' they have an embossment of cross-lines, making a continuous embossment clear around the spool head.

15 Q. Chadwick's thread has been mentioned in the recent testimony. State what thread that is and at what price it is sold.

(Objected to as immaterial.)

A. It is a 200-yard thread recently introduced or trying to be introduced into this country, of good quality, and is offered to the trade and is advertised as a six-cord at a less price than the Merrick's six-cord.

16 Q. How is it succeeding, and what obstacle is it meeting with in addition to the obstacles any new six-cord thread meets with?

(Objected to as immaterial.)

A. So far as I can learn it is making very slow progress, and the trades say that it is partly on account of the label not being of the well-known badge of six-cord thread, and the people think that it is a three-cord cotton from the fact that it hasn't the black or gold label.

17 Q. What have you learned as the reason for Kerr's change from another label to a black and gold label?

(Objected to as immaterial and as calling for hearsay.)

A. I learned from Mr. Kerr's manager of Newark that it was impossible for them to introduce their six-cord 200-yard thread to any great extent under the label which they formerly had upon it and with their old shape of spool, and that they had to change to the usual form of spool and the black and gold label.

18 Q. State what you ascertained as to the store of L. Abraham, 183 Third avenue, and when.

(Objected to as calling for hearsay.)

1108 A. Right after Mrs. Hornblower was examined I ascertained that Coats' thread was not and had not been kept at that place, and also that no such transaction as she reported took place there so far as could be discovered.

19 Q. How did you ascertain this?

(Objected to as calling for hearsay.)

A. I sent Mr. Jonathan Nathan, a clerk of H. F. Palmer, who reported to me as I have stated, and in addition that he had personally examined the entire stock of thread there and found no Coats' thread among it.

20 Q. What is the most important thing to the consumer to know about this thread and to have plainly appear and stay upon it?

A. First the name and then the number.

21 Q. Besides the business done at and from your mills in Holyoke where and when have agencies been established?

(Objected to as immaterial.)

A. New York and Philadelphia; about the time the company commenced to make spool cotton; in Boston for at least fifteen years, and in Chicago for five years.

22 Q. From what time has your company's 200-yard six-cord thread been sold from these agencies, respectively?

(Objected to as immaterial.)

A. From the New York and Philadelphia offices from the time we commenced to make six-cord thread, in 1868 or 1869, and from the other two from the time they were started.

23 Q. From what time has your thread been on sale at all these places, except Chicago, precisely as it appears in "Defendants' Exhibit No. 48"?

(Objected to as immaterial.)

A. Since 1879.

1109 24 Q. Since you gave an account of the magnitude of the enterprise of the Merrick Thread Co. at Holyoke, state whether any or what further advance has been made.

(Objected to as immaterial.)

A. We are now finishing another mill with a capacity of 30,000 spindles at a cost, when finished and equipped with machinery, of $500,000; the mill is 300 feet long, 90 feet wide, and four stories high.

25 Q. How has the Merrick Thread Company been able to establish and build up in this country a trade in 200-yard six-cord thread of the magnitude which it has obtained?

(Objected to as immaterial.)

A. First by making thread of the very best quality that it was possible to make and by selling direct to consumers and the small trade at a little less price than the older thread were selling for, we giving to those who bought 100 dozen the same price that they could get the combination threads for which required them to buy 1,000 dozen; by spending large sums in advertising and sending traveling men through the country to get the families to try it and test it, to see that it was as good as any thread made. In many cases we have had to give away considerable quantities to get them to try it.

26 Q. Give your opinion, as a man who has been for many years acquainted with the course of manufacture and trade in the best quality of 200-yard spool cotton in this country, as to what would be the effect upon your company if you should become a member of the so-called combination and not sell your product at a less price than the combination prices, as set forth by you, and give reasons for your opinion.

(Objected to as immaterial.)

1110 A. I think we should sell but a very little six-cord 200-yard thread. The combination have it arranged in such a way that unless a person sells a certain amount, which is a pretty large quantity, in six months he cannot get the extra discount of 9 per cent., and the older threads being longer established and better known in the market makes it very much easier for dealers to sell the quantity in the given time than if they undertook to sell two brands of thread or a new brand alone; consequently they would buy that old brand which they could sell the easiest and get the extra discount for selling the quantity.

And being cross-examined by SAMUEL R. BETTS, counsel for complainants:

27 X Q. Are you the Lyman R. Hopkins who has already twice testified on the part of the defendants in this case?

A. Yes, sir.

28 X Q. Are you an officer of the Merrick Thread Co.; and, if so, what office do you hold?

A. I am president of the company.

29 X Q. In your inquiries have you found persons who knew that Coats' 200-yard spool cotton was not six-cord in the numbers above 100, have you not?

A. I have inquired of one or two who said they did not know whether it was six or three cord thread in the finest numbers.

30 X Q. What numbers does the Merrick Thread Co. make or sell above 100?

A. Which do you mean, three or six cord?

31 X Q. I mean the thread you sell with the black and gold label on it.

A. Up to 140—that is, 110, 120, 130, 140.

32 X Q. Does not the Merrick Thread Co. sell No. 150 with a black and gold label on the spool?

A. There may be a few. I wouldn't say certain; there may be a few 150.

33 X Q. Have you ever made 150 six-cord?

1111 A. I think there was a little made of No. 150.

34 X Q. Is the number 150 thread that you have sold, with the black and gold label on it, six-cord?

A. It is six-cord if marked six-cord.

35 X Q. Is it six-cord, in fact?

A. I can't answer any different than I have; I wouldn't be certain whether there is any six-cord 150 made or not, but there might have been; if there has been any 150 six-cord made it was recently.

36 X Q. Do you consider a black and gilt label the badge of six-cord thread?

A. I think that about all of the six-cord thread have a black and gold label and that the three-cord thread, as a general thing, have a label which is not black and gold.

37 X Q. Has the Merrick Thread Co. ever made or sold a No. 200 thread with a black and gold label on the spool?

A. I have no recollection of ever seeing any; I couldn't swear positively that it hasn't been done.

38 X Q. Do you sell any numbers 110, 120, 130, 140, — 150 thread without a black and gold label on the spools?

A. Not of 200 yards.

39 X Q. Have you never done so?

A. Not that I know of.

40 X Q. In how many yard spools do you sell it?

A. Do you mean three-cord or six-cord?

41 X Q. I mean either, any thread without a black and gold label on the spools.

A. We sell 1,200 yards, 2,400 yards, 12,000 yards.

42 X Q. Do you sell any three-cord thread of the Nos. 110, 120, 130, 140, and 150, or have you ever done so?

A. Those are the very numbers I have just told you we sell on 1,200, 2,400, and 12,000 yards on a spool.

43 X Q. Do you sell any three-cord thread of those numbers on 200-yard spools, or have you ever done so?

1112 A. We did sell some, five or six years ago.

44 X Q. What kind of labels did those three-cord 200-yard spools have on them?

A. Had a black and gold label that said Merrick Thread Co., and they are represented in an exhibit in this case.

45 X Q. Did they have the same label as the 200-yard spools you were then making six-cord in the lower numbers?

A. I think all the numbers that were six-cord said six-cord on the labels; the others said Merrick Thread Co. on the black and gold labels.

46 X Q. Then the black and gold labels were the same on the three-cord and six-cord spools, except this change in the wording you have stated. Is that so?

A. I think they were.

47 X Q. Looking at the labels on the spools *ob*tained in the boxes marked Defendants' Exhibit No. 68, No. 110 Coats', Defendants' Exhibit No. 69, 130 Coats', and Defendants' Exhibit No. 70, 140 Coats', do you find any mention on said spool labels that the thread is six-cord?

A. I find it says "best spool cotton," which to my mind means best six-cord.

(Answer objected to as irresponsive, the best spool cotton being made is six-cord.)

48 X Q. Question repeated.

A. I consider that it means six-cord.

(Answer objected to as irresponsive.)

49 X Q. Question repeated.

A. Do you want more answer?

50 X Q. Yes; I want a direct answer.

A. Yes; if you want it.

51 X Q. Then you testify, under oath, do you, that you find on

those Defendants' Exhibits No. 68, No. 69, No. 70, upon the labels on those spools contained in those boxes, a statement that the thread is six-cord?

1113 A. I so consider it, as the best spool cotton is made of six-cord.

52 X Q. How many cord was the best spool cotton you made of No. 130 and No. 140 when the Merrick Thread Co. first put those numbers on the market?

A. The best three-cord spool cotton was made of the best stock that we were using at that time.

(Answer objected to as irresponsive.)

53 X Q. Question repeated.

A. The best spool cotton that the Merrick Thread Co. made at that time was three-cord.

54 X Q. And you would have considered it a fraud on the public, I suppose, to advertise that as Merrick's best spool cotton, would you?

A. If we had been making a line of 200 yards, six-cord, and had put that up on the same general style, I shouldn't think it was right if we had on the others best six-cord to put on that best spool cotton.

55 X Q. Has not your company done this, namely, put on the market thread which was three-cord in the higher numbers, having on the spools the black and gold label, the same as on your six-cord thread, except that the words "six-cord" were omitted and put in boxes similar to those in which the lower numbers, which were in fact six-cord, were sold?

A. There were a few boxes of 110 that had a label on the top of the box that said "six-cord" on it; it was a label which belonged on a hundred box, and as soon as my attention was called to it I had it stopped.

56 X Q. Will you tell me what the words J. & P. Coats' best spool cotton mean, other than that it is the best spool cotton J. & P. Coats make and sell of the number on the label on which those words appear?

A. In connection with the label on the box I should consider that it meant the six-cord.

57 X Q. Although you know that the labels on the spools in numbers below 100 all have the word six-cord on them, while those
1114 in numbers above 100 do not have those words, do you still claim that you would be lead to believe by the spool label that the thread was six-cord where those words were omitted?

A. If I had noticed the difference in that wording I should probably be led to investigate and see, being a manufacturer; I should think it was six-cord until I had done so.

Adjourned to March 15th, 1888, at 11 a. m.

NEW YORK, *March 15th*, 1888—11 a. m.

Parties met pursuant to adjournment.
Present: Counsel and witness as before.

The witness being further cross-examined:

58 X Q. What grade of thread do the words "best six-cord thread" indicate to your mind?

A. It indicates to my mind thread made of six cords—six separate strands.

59 X Q. And what grade of thread as compared with others?

A. I think it is a better grade than the three-cord thread.

60 X Q. Did you ever hear of spool cotton that was more than six-cord?

A. Yes, sir.

61 X Q. How many cord was it and whose make?

A. We have made it of nine-cord and I have seen it of others, but I don't recollect the brand now; it was in a very small way.

62 X Q. Then if the number of cords, other things being the same, indicates the quality of thread, your six-cord thread is not the best thread you have made; is that so?

A. I think that a six-cord thread can be made as good as
1115 any number of cord; in twisting the strands together the first time and then reversing the twist the next time gives it the cable twist, which gives it the quality, in my mind.

63 X Q. Cannot nine-cord thread be made in this same way only having the three threads that are finally twisted together, each composed of three strands instead of two as in six-cord?

A. Yes, sir; in the same way, but our experience proved that it made the thread too hard—not soft enough.

64 X Q. Then, in your opinion, an increase in the number of cords, the same material and workmanship being employed, does not necessarily produce a better thread?

A. Not if you have strands enough to get the cable twist.

65 X Q. The cable twist makes a harder thread than the single twist, does it not?

A. Yes, sir; I should think it was more compact.

66 X Q. In what numbers did you make your nine-cord thread?

A. I couldn't say exactly; I should say from 20 to 40.

67 X Q. Have you never made No. 200 spool thread?

A. Not to my knowledge; I couldn't say what had been done at the mill; but not to my knowledge.

68 X Q. Have not manufacturers like Clark's O. N. T., Clark's Mile-end, Willimantic, and Coats machinery and facilities for making as many cord thread in higher numbers as your company?

A. I suppose they have; I never was in their mills.

69 X Q. What proportion of your total sales of 200-yard six-cord thread is in numbers above 100?

(Question objected to as a question which complainants' witnesses have declined to answer as already answered as fully as the
1116 witness was able to answer it when cross-examined long ago

by Mr. F. H. Betts, and also as not a pertinent question to the direct examination.)

A. We never keep any account of the different numbers, as they are all charged at the same price; but my opinion at the present time, it would be as much as a half of one per cent.

70 X Q. What are the higher numbers of spool cotton above 100 principally used for?

A. Sewing very fine muslins, fine ladies' collars and cuffs; we sell some for manufacturing neck-ties; that is all.

71 X Q. Has not the Merrick Thread Co. sold all its 200-yard spools with the black and gold label on them at the same price without regard to the number of the thread?

A. Not always; there was at one time some numbers which had a black and gold label which were sold at the same price as six-cord. When my attention was called to the fact by Mr. Palmer I told him to sell it at the three-cord price.

72 X Q. Then your company has sold three-cord thread having a black and gold label on the spool at the same price as the six-cord thread having a black and gold label?

A. I think they did a little at one time.

73 X Q. What numbers was this three-cord thread with the black and gold labels that you sold at the six-cord price?

A. I couldn't say exactly, but probably they were put up as high as 140 and 150—from 100 to 140 or 150.

74 X Q. Did you begin making all the numbers from 110 to 140 six-cord at one time, or did you do it gradually, and, if so, what interval of time was there between the different numbers being raised to six-cord?

A. I think when we decided to make six-cord finer than 100 we made arrangements to make it up from 100 to 140, but we
1117 commenced to finish the 110 and 120 first; and the length of time it took to get all the numbers I couldn't say, as it is a very slow and difficult process to make those fine numbers in six-cord.

75 X Q. Do you sell your higher numbers above 100 at a lower price than Coats', the two Clarks', or the Willimantic sell their numbers above 100, referring to 200-yard spools bearing the black and gold label?

A. I think we get about the same price, we selling direct to the retailer and they selling through the jobber.

76 X Q. Selling to the same persons, you sell those numbers lower than the concerns I have mentioned, do you not, at regular prices?

A. There is the same difference in those numbers as in all the other numbers; our thread is sold at a less price than the others are—a trifle less.

77 X Q. Are not the finer numbers of thread, those above 100, more expensive to manufacture than the numbers below 100?

A. Yes, sir.

78 X Q. You state in your answer to question 8 how Coats' can be retailed at four cents a spool and leave a profit. This would not

be true in any event unless a person bought 1,000 dozen in six months, would it?

A. It wouldn't be true unless he got the six and nine per cent.

79 X Q. And he wouldn't get that discount unless he bought 1,000 dozen in six months, would he?

A. They tell me they have ways of getting it; I don't know exactly what the Coats arrangements are; I have heard that a person had to buy 1,000 dozen in six months in order to get the full discount.

80 X Q. Is there not, in your opinion, an advantage in being able to distinguish the make of the thread by the embossed numbers on the spool when the label is lost, if that can be done?

1118 A. I don't think that indicates the make on anybody's spool; that indicates the number—the size of the thread.

81 X Q. If no maker besides Coats used raised numbers on their spool heads would that not indicate that the spools were of Coats' thread, even though the paper labels were lost or illegible?

A. I don't think it would; it was put there for a different purpose; I don't think anybody would look at it, thinking it was any particular make.

82 X Q. If it were generally known that Coats' spools were the only ones that had the number of the thread embossed or raised around the spool head, would that not indicate that spools and spool heads which had those raised numbers on them, but from which the paper labels had been lost, were of Coats' make?

A. Not necessarily; people who want to know who the maker of the thread is look for the name.

83 X Q. And if the name was lost off, but the embossed numbers appeared, which we will suppose had been adopted by Coats and used by their concern alone, would not those raised numbers, to a person familiar with them on the Coats spools, — that the spools that bore them were of Coats' make?

A. If the spools were exactly alike in every other way it might to a person who had never seen other spools embossed in different patterns; might have some effect to make them think it was Coats' if there was no ticket on them.

(Defendants' counsel here states that he considers none of the questions that have been put to day to this witness as proper cross-questions or warranted by the direct examination, and he objects to them for that reason and gives notice that the complainants' counsel must bear the burden of the witness being his own.

Complainants' counsel refers the court to direct question and answer 14 of this witness as a reply to the above statement.)

1119 84 X Q. Why did Kerr's have to change from their old shape of spool and label in order to introduce their six-cord 200-yard thread to any great extent?

A. All I know about it is what their manager said; said they had spent a great deal of money trying to introduce their short spool, and they had had to give it up; they couldn't make it go. I think he said it was so radically different from the style of spool and label.

85 X Q. Did not Kerr's spools have the name Kerr on the former labels?

A. I think it did.

86 X Q. Did not Chadwick's 200-yard six-cord spools have the name Chadwick on their labels?

A. I think it does. I never saw but one spool, to have it in my hand.

87 X Q. If spool cotton is sold wholly by the name of the maker and people asked for Kerr's or Chadwick's and received either of these brands as asked for, and saw the name on the label, can you tell me why the appearance of the label made it hard to sell those brands?

A. Yes, sir; I think I can. The people tell me, who try to sell it, that the customers thought it was basting cotton—cheap cotton.

88 X Q. Do not Kerr's and Chadwick's have six-cord on the label?

A. I think they do.

89 X Q. Then why should people think it was three-cord?

A. Because manufacturers don't always tell the truth on the label.

90 X Q. Then customers do notice the appearance of the spools in the case of Kerr's and Chadwick's, don't they, and do not rely on the statements of the labels, as far as you have learned?

A. I can't state it any plainer than I have. The traders tell me that the people seeing so different a label on Chadwick's, so different from the ordinary six-cord label, that they think it is basting cotton.

1120 91 X Q. Do you believe that you could have introduced your six-cord 200-yards thread upon the market to the extent you have if you had not adopted the present appearance of your spools, including the black and gold label and the embossed numbers on the spool head?

(Same objection and notice as last made.)

A. I think if we had made a thing radically different we should have had the same trouble that others have had.

92 X Q. The same trouble in introducing your six-cord thread, do you mean?

A. Yes, sir.

93 X Q. Then, if you had not adopted the black and gold label and the embossed numbers, do you think you could have introduced your six-cord thread on 200-yard spools to the extent you have?

A. I think that a black and gold label is a badge to a certain extent of the six-cord thread, and I think there is an advantage, others things being equal, to have the numbers on the wood, as that makes it permanent and handy to determine the number in any position which you hold the spool, and after the expiration of the patent I think we had a right to use it.

(Answer objected to as irresponsive.)

94 X Q. Question repeated.

A. I have no other answer to give.

(Same objection.)

95 X Q. Question repeated.

A. I have answered that question twice, and I think that will do, in different forms.

96 X Q. You have not answered my 93 X Q. at all responsively, but have merely given me some of your ideas on subjects not inquired about. Please try and answer this fully.

(Defendant's counsel says, in his opinion, that the question
1121 does not admit of a categorical answer, because it is so very hypoth-ical and so many problems enter into the *the* success or future of a new enterprise, among which may be mentioned the capital, expenditure, the personal equation of the managing spirit of the enterprise, etc., etc.)

(Complainants' counsel objects to the above statement as wholly improper.)

A. I can't answer different from what I have—that is, that, other things being equal, I think that the black and gold label and the numbers on the wood, making it permanent, is a help towards introducing a new six-cord thread.

97 X Q. Would it not aid the introduction of a new six-cord thread to exactly copy the labels and appearance of spools of an old and well-established brand, so that the new brand should present the same appearance as the old, except the name should be distinguishable on the label to the persons who read it?

(Objected to as hypoth-ical, and same as heretofore.)

A. That would depend upon what the article was known by in the market and asked for by to a great extent.

98 X Q. What do you mean by your last answer?

A. I meant to answer your question.

99 X Q. Well, what do you mean by your answer to my question?

A. That's all I've got to say; I've answered it.

100 X Q. What do you mean by the words "what the article was known by on the market"?

A. I mean that if an article was known by the name and the name was on it that the other things wouldn't make much difference.

101 X Q. Does this agree with your testimony in regard to Kerr's and Chadwick's thread? Did the other things make "not much difference" in those cases?

1122 A. Well, that would depend upon what definition was put on the word "much" or "very much."

102 X Q. It made enough difference in the case of Kerr's thread to induce them to change that label, did it not?

A. Not on all their thread. They got the first introduced to a certain extent, and they still put up some now.

103 X Q. But they have changed their labels on 200-yard six-cord, have they not?

A. I understand they have changed them on part of it.

104 X Q. To what extent is the new mill you speak of, in answer to question 24, to be devoted to the manufacture of six-cord thread?

A. We haven't determined yet.

105 X Q. Will it be devoted to the manufacture of six-cord thread to any extent?

A. Probably.

And being further examined, he says:

106 R. D. Q. It has appeared in your testimony heretofore that you were engaged in selling spool thread, among other things, at retail at a place called Nooseneck, in Rhode Island. In what township was that village situated? And state whether you represented the township at that time and afterwards in the Rhode Island legislature, and state whether as senator or representative.

(Objected to as not called for by cross-examination.)

A. West Greenwich. I did represent the town as senator at that time and for some four or five years until I resigned.

LYMAN R. HOPKINS.

Subscribed and sworn to before me this 14th day of March, 1888.

[SEAL.] W. H. KENYON,
Notary Public, N. Y. Co.

1123 U. S. Circuit Court, Southern District of New York

Sir PETER COATS *et al.*
v.
MERRICK THREAD Co. *et al.* } In Equity.

STATE OF NEW YORK,
City and County of New York, } *ss:*

I, Wm. H. Kenyon, a notary public duly appointed, qualified, and sworn in and for the city and county of New York, in the State of New York, do hereby certify that the foregoing are proofs for final hearing regularly taken before me by consent in the cause in the caption named on the part of the defendants under and pursuant to the 67th rule of the Supreme Court of the United States, in equity, as amended.

W. H. KENYON,
Notary Public and Examiner.

1124 DEFENDANTS' EXHIBIT No. 13. Coats' Best Six-Cord Bill-Head. T. H., Sp. Ex.

Selling price for wholesale dealers. P. O. box No. 2.

55 cents, { less 5 per cent. 30 days, or 6 " 10 "

NEW YORK, ——, 1884.

Messrs. —— —— bought of Auchincloss Brothers, 47 & 49 White street.

Cash in New York bankable funds within 30 days.

No insurance effected without written instructions with order.

— doz. J. & P. Coats' best six-cord 200-yard thread at 55 cts.

Discount, 6 per cent.

1125 Duplicate.

DEFENDANTS' EXHIBIT No. 14. Coats' Bill-Head No. 2. T. H., Sp. Ex.

Selling price for wholesale dealers. P. O. box. No. 2.

55 cents, { less 5 per cent. 30 days, or 6 " 10 "

NEW YORK, *Jan'y* 22, 1885.

Messrs. Calhoun, Robbins & Co. bought of Auchincloss Brothers, 47 & 49 White street.

Cash in New York bankable funds within 30 days.

No insurance effected without written instructions with order.

W. & cols., 160 doz. J. & P. Coats' best six-cord 200-yard thread at 55 cts.	88	
Discount, 6 per cent.	5	28
		$82 72

1126 DEFENDANTS' EXHIBIT No. 49. Coats' Bill-Head No. 3. W. H. K., Notary.

Selling price for wholesale dealers. P. O. box No. 2.

55 cents, { less 5 per cent. 30 days, or 6 " 10 "

NEW YORK, *Sept.* 11, 1883.

Messrs. Geo. P. Baldwin & Co. bought of Auchincloss Brothers, 47 & 49 White street.

Cash in New York bankable funds.
No insurance effected without written instructions with order.

8	150	1 100	doz. J. & P. Coats' best six-cord 200-yard thread at 55 cts.	55
			Discount, 6 per cent.	3 30
				$51 70

Paid. U. S. Ex. 92 W.

AUCHINCLOSS BROTHERS.
SHARP.

1127 DEFENDANTS' EXHIBIT No. 31. Assignment of Design Patent. W. H. K., Notary.

(2–175.)

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of an instrument of writing executed by Hezekiah Conant September 10, 1874, recorded in Liber G 18, page 405. Said record has been carefully compared with the original and is a correct transcript thereof.

In testimony whereof I, R. G. Dyrenforth, acting Commissioner of Patents, have caused the seal of the Patent Office to be affixed this 28th day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[L. S.] R. G. DYRENFORTH,
Acting Commissioner.

Liber G 18, p. 405.—This indenture, made the tenth day of September, one thousand eight hundred and seventy-four, between Hezekiah Conant, of Pawtucket, Rhode Island, of the first part, and J. & P. Coats, of Pawtucket aforesaid, and also of Paisley, Scotland, of the second part:

Whereas a patent was heretofore, on the fifth day of April, one thousand eight hundred and seventy, issued by the authority of the United States of America to the party of the first part for a design for spools of thread, numbered 3949:

Now, therefore, the party of the first part, in consideration
1128 of one dollar to him paid and of other good consideration, doth hereby sell, transfer, and assign unto the said J. & P. Coats and their assigns the said patent, numbered 3949, issued to the said Hezekiah Conant by authority of the United States of America on the fifth day of April, one thousand eight hundred and seventy, for a design for spools for thread, together with all extentions, additions, and improvements and everything appertaining or incident thereto.

In witness whereof the party of the first part hath hereunto set his hand and seal the day and year first above written.

HEZEKIAH CONANT. [L. S.]

Sealed and delivered in the presence of—
WM. H. CLAPP.

STATE OF RHODE ISLAND, } ss:
Providence, }

Then Hezekiah Conant appeared before me in Pawtucket, in said county, on the 14th day of September, 1874, and acknowledged the foregoing instrument by him signed to be his free and voluntary act and deed.

Witness my hand and official seal.

[L. S.] WM. H. CLAPP,
Notary Public.

Recorded Sept. 16, 1874.
Ex'd: H. M. H.; E. A. M.

1129 DEFENDANTS' EXHIBIT No. 51. Coats *v.* Willington. W. H. K., Notary.

Superior Court, Tolland County, January Term, 1854.

J. & P. COATS, of Scotland, England, Petitioners; }
— }
WILLINGTON THREAD CO., of Willington, Respondents. }

Upon the petition of Peter Coats and Thomas Coats, both of the town of Paisley, in Scotland, in the Kingdom of Great Britain, and partners in business under the name, style, and firm of J. & P. Coats, showing to this court that for many years the petitioners as partners of one James Coats, now deceased, under the said firm of J. & P. Coats, and since the decease of the said James Coats as of the said J. & P. Coats, and under said name, style, and firm have been the manufacturers and sellers of spool-cotton thread used for sewing and have forwarded the same to their agent in the city of Philadel-

phia and State of Pennsylvania and elsewhere in the United States where they have resident agents to make sales and protect their rights, and still continue to manufacture and sell said thread as aforesaid; that they have for many years dealt in such thread in Philadelphia, New York, and elsewhere in the United States and their sales have been very great; that, with a view to make an honest and superior article of thread, they have expended large
1130 sums of money in perfecting the manufacture thereof and have succeeded in making their thread a first-rate article in American market and have acquired great fame and reputation with the public as well on account of its excellent quality and goodness as of the fairness of the alleged quantity or length at which it is advertised to be sold, and that their said thread is manufactured of the best material and of divers sizes or numbers from 8 to 200, denoting different degrees of fineness; that their said thread as numbered from 8 to 40 are threads of six cords, while those from 40 to 70 are of four cords and above 70 are threads of three cords, and that the petitioners ever have been and still are used and accustomed to put up and sell said thread on wooden spools containing 200 yards each, each spool having on one end a circular label in black and gilt with the following, amongst other words and figures, printed thereon—that is to say: J. & P. Coats' best six-cord, 200 yards; said spools being put up in parcels of twelve spools each, each parcel being wrapped in drab and brownish paper wrappers, each parcel being tied with a twine and having on its outside a label like that before described, and also an engraving or cut representing their shields with flag, together with a lion and eagle as supported, with the following printed under the same: "J. & P. Coats' best six-cord spool cotton, warranted 200 yds." Thus their said thread is and for many years has been known in this and other States, as well to the public as to the principal dealers, by the name of "Coats' thread," and is in great demand, and that there is no thread which is known in said States as "Coats' thread" except the thread of the petitioners; and also averring that the Willington Thread Company, a body corporate and politic by the laws of this State, located and doing business in the town of Willington, in said Tolland county, well knowing the premises, but intending and contriving to defraud the petitioners and depriving them of a por-
1131 tion of the profits and gains which they were and are entitled to have and receive from the sale and exclusive manufacture and sale of spool cotton labeled and marked as aforesaid, and in order to avail themselves without law or right of the good name and reputation which the petitioners have acquired, for more than one year prior to the date of said petition have manufactured, prepared, and sold and continue to manufacture, prepare, and sell large quantities of cotton thread in imitation of the said thread so manufactured and sold by the said petitioners, and that during the said time the respondents have put up and still continue to put up and cause to be put up their said thread on wooden spools containing about one hundred and fifty yards each, each spool having on one end a circular label in black and gilt with the following, amongst other words

and figures, printed thereon—that is to say: "Coats' best six-cord, 200 yds.;" that the label so used by the respondents is a copy of the label used by the petitioners on the end of their spools, except that the letters J. & P. are omitted in the labels so used by the respondents, and that the word "American" is printed on the labels so used by the respondents, but said word is printed in so small a type and the letters are so arranged and disposed of around the circumference of said label and are so great a distance from each other that the same would not be noticed except on close inspection; and averring that the said spools of the respondents are put up in parcels of twelve spools each, each parcel wrapped in drab or brownish paper wrappers, each parcel being tied with a twine and having on its outside a label like that described last before, and also an engraving or cut representing an eagle with flags, with the following printed under the same: "Best six-cord spool cotton, Coats', warranted 200 yds.," being an exact copy of the words and figures printed under the cut or engraving on the genuine wrappers of the petitioners as above set forth, except that the letters J. & P. are omitted on
1132 the wrappers of the respondents, and that the said wrappers and labels so used by the respondents are so used by them in order to denote that the thread so manufactured, prepared, and sold by the respondents is the genuine six-cord spool cotton manufactured and prepared and sold by the petitioners, and that said labels and wrappers are well calculated to deceive the unwary and to lead them to purchase the said spurious thread so manufactured and sold by the respondents as and for the genuine thread so made and sold by J. & P. Coats and known by the name of Coats' thread, as above set forth, and that, as the petitioners believe, the respondents, by means of said false and simulated labels and wrappers, have been enabled to sell in this State and elsewhere and have sold and disposed of more than one hundred thousand dozen spools of their said thread so labeled and put up as and for the genuine best six-cord spool cotton which had been manufactured, prepared, and sold by the petitioners, whereas, in truth and in fact, the petitioners had never been the manufacturers, preparers, or sellers thereof or any part thereof and said thread of the respondents is of an inferior quality, is not made of six cords, but are threads of only three cords, and is manufactured of bad materials and contains only one hundred and fifty yards to the spool, and that the same is sold by the respondents for about one-half the market value of said genuine thread of the petitioners, and that by means of said wrongful and fraudulent acts of said Willington Thread Company the petitioners have been wrongfully and — hindered and prevented from selling divers large quantities of their said thread (to wit), an hundred thousand dozen spools of thread, and the good fame and reputation of said petitioners has been greatly injured, and that the petitioners have good reason to fear that if said respondents should continue their said wrongful acts the said good name and reputation of the petitioners will
1133 be wholly destroyed and the petitioners will wholly lose their said trade in the sale of their said thread and the profits and gains accruing thereon; and averring that the said Willington

Thread Company still continue to manufacture, put up, and sell and threaten that they will continue to manufacture, put up, and sell said spurious thread and use said false and simulated labels and wrappers as they have heretofore done, though requested by the petitioners to desist therefrom, and that if said Willington Thread Company shall be permitted to continue to manufacture, put up, and sell said spurious thread and use said false and simulated labels and wrappers thereon the good name and repute of the genuine thread of the petitioners will be destroyed thereby and the petitioners will be defrauded and prevented from selling their said genuine thread and their rights will be sacrificed, and praying for an injunction to restrain the respondents from manufacturing and selling thread put up in imitation of the said thread of the petitioners and from using false and simulated labels and wrappers and also from using the word Coats on their said labels and wrappers or any other word or words which shall falsely denote that the thread manufactured, put up, and sold by them is the thread of the petitioners, as per petition on file, dated 30th day of September, 1851, which has been duly served and returned, appears; and the respondents having appeared at the April term of this court, A. D. 1853, Francis Fellows, Esq., was appointed by this court a committee to hear the parties with their evidence and to report to this court at the next term thereof the facts alleged in said petition which he should find to be proved and true, and at the October term of this court, 1853, the said committee made his report to this court "that he finds the facts alleged in the petition in said case to be true." This court doth accept said report and doth find the facts therein set forth in said petition to be true. This court doth,
1134 therefore, enjoin and command the respondents, their assistants, agents, and workmen, to desist from manufacturing and selling thread put up in imitation of the said thread of the petitioners and from using said false and simulated labels and wrappers on their said thread, and that they also desist and cease from using the word Coats on their labels and wrappers for their said thread or any other word or words which shall falsely denote that the thread manufactured, put up, and sold by the respondents is the thread manufactured, put up, and sold by the petitioners under the penalty of ten thousand dollars; and it is further ordered and decreed that the respondents pay to the petitioners the cost of this petition, taxed and allowed to be 59.86 dollars.

By order of the court: JOSEPH BISHOP, *Clerk.*

STATE OF CONNECTICUT, }
County of Tolland. }

OFFICE OF CLERK OF THE SUPERIOR COURT,
TOLLAND, *January 31st, A. D.* 1885.

I hereby certify the foregoing to be a true copy of record under my hand and the seal of said superior court.

Attest:
[L. S.] ERWIN O. DIMOCK, *Clerk.*

(Here follow fac-similies marked pp. 1135, 1136.)

Complainants' Exhibit A. 2807

Beware of Fraud!

ON 2808

J. & P. COATS'

THREAD! 2809

Several manufacturers of thread are imitating J. & P. Coats' SPOOLS, and the fraud can only be detected in closely looking for the name on the printed label of the spool. See that J. & P. COATS' name is on every spool. 2810

Sir Peter Coats et al vs. Merrick Thread Co No. 261 } Jp. 1135

1137 DEFENDANTS' EXHIBIT No. 62.

Combination Notice to Jobbers. W. H. K., Notary.

Revised list.

NEW YORK, *December*, 1887.

Agency Clark's "O. N. T." spool cotton, 400 Broadway.

Mr. E. A. La Pard, city.

SIR: Clark's "O. N. T." spool cotton is offered for sale at four cents per spool or forty-eight cents per dozen by the following dealers, namely:

Leboutillier Brothers, 50 W. 23d St., N. Y. city.
Leboutillier Brothers, 48 E. 14th St., "
Callahan & Morrissy, 48 W. 14th St., "
J. N. Collins, 32 W. 14th St., "
Heather & Co., 28 W. 14th St., "
Karsch Brothers, 528 Eighth Ave., "
Thomas Courtney, 310 Spring St., "

In the interest of trade prices, we urgently request that you decline to fill all orders, either directly or indirectly, for Clark's "O. N. T." spool cotton from any of the above-named dealers.

Please cancel all former lists and notify your notion buyer and salesman with the contents of this circular, and oblige—

Your friends, GEO. A. CLARK & BROTHER,
Sole Agents.

1138 DEFENDANTS' EXHIBIT No. 65. Partridge Affidavit. W. H. P., Notary.

United States Circuit Court, Southern District of New York.

COATS *et al.*
v.
MERRICK THREAD CO. *et al.* } In Equity.

STATE OF ILLINOIS, }
Cook County, } *ss:*

Mrs. Thomas W. Partridge, being duly sworn, deposes and says as follows: I am twenty-six years old and live at No. 228 South Hoyne street, Chicago, and Mr. P. V. Root is one of my boarders. I have never been deceived into purchasing Merrick's thread for Coats' thread or taken one for the other by mistake or purchased one thinking I was getting the other or afterwards discovered that I had some other thread than I thought I had purchased. Some time ago, perhaps a year or more, I remember asking for thread—I think for Willimantic or Merrick's thread—and being unable to get it, and I well remember that the clerk told me that they did not

have that thread, but he let me have another kind which he said was just as good, explaining that it was a different thread, but that he could recommend it as a good thread. I understood when I took the thread what make it was, and I was not either then or at any other time in any way deceived. Spool threads are sold,
1139 asked for, and known by their names, and I don't see how any one could mistake Coats' for Merrick or Merrick for Coats', because the name is plainly printed upon each in the usual place. I can't recall the store where the above incident occurred, but think it may have been at Hodge's.

MRS. T. W. PARTRIDGE.

Subscribed and sworn to before me this 30th day of January, A. D. 1888.

[L. S.] MATTIE L. ALLEN,
Notary Public.

1140 United States Circuit Court, Southern District of New York.

J. & P. COATS
vs.
MERRICK THREAD CO. *et al.* } In Equity. April Term, 1888.

After issue joined and proofs taken the plaintiffs moved to further amend their bill. The motion was denied, with leave to renew it at the hearing. It has been renewed and is now granted to make the case symmetrical. The plaintiffs' firm have for a very long time made six-cord sewing thread and sold it on spools of light-colored wood holding two hundred (200) yards each, and since about 1842 have used on each spool head a circular label, smaller than the head, of light gold color around a dark centre having a dark line around near the margin and the firm name, and the words best six-cord in a circle inside the line on the gold ground, and the number of the thread with the figures and letters 200 yds. in light gold color on the dark ground of the centre, leaving the wood of the
1141 spool bare around the label. On April 5, 1870, design letters patent No. 3939 were granted to Hezekiah Conant for embossing the number of the thread in figures on the wood of spools in spaces around the label to run seven years, and were acquired by the plaintiffs. Since about 1873 they have used these embossed numbers on their spool heads in connection with the label. The defendants make six-cord sewing thread and sell it on spools holding 200 yards each, and since 1878 have used substantially such a label, with the name of the Merrick Thread Company substituted for that of the plaintiffs, the figures and letters 200 yds. omitted, a star in place of the number in the centre, and the number at one side, in connection with similar embossed numbers on the margin of the spool head. The bill is brought as it stands amended for relief against such use of these labels and embossed numbers.

The plaintiffs have no monopoly of six-cord thread or of the sale of it in lengths of 200 yards on spools. All others have a right to manu-

facture it, put it up in that form, describe it, and dispose of it. They have an exclusive right to the reputation acquired by their
1142 thread and to have the thread pass current in trade as theirs, and no one has the right to give currency to other thread than theirs as theirs. McLean *vs.* Fleming, 96 U S., 245; Trade-Mark cases, 100 U. S., 82. The words best six-cord are merely descriptive of the quality and the figures merely denote the size of the thread. These are all the statements that are common to both labels and these could not be appropriated by the plaintiffs to the exclusion of others for these purposes. Manufacturing Co. *vs.* Trainer, 101 U. S., 51. When the patent expired the use of the embossed numbers, for all lawful purposes, became free to all. Grant *vs.* Raymond, 6 Pet., 218. These principles are not much controverted, but the plaintiffs insist that their long use of these words and figures displayed in these forms and colors upon their labels on the central parts of their spool heads of light-colored wood has made the mere appearance of the spools, without reading the labels, a representation that the thread is of their manufacture and that their use of the embossed numbers with the label has made that combination by its mere appearance a still stronger representation to that effect. Whether the appearance amounts to such a repre-
1143 sentation is a question of fact to be determined on the evidence. Black and gilt labels appear to have been used by others on spools of thread nearly and perhaps quite as early as by the plaintiffs. Some similar to the plaintiffs', with the names of the makers of the thread in place of the plaintiffs' names, were used to some extent on six-cord thread in lengths of 200 yards on each spool from 1854 to 1874, and some without the words and figures best six-cord and 200 yds., with a like substitution of names, were used on spools of 200 yards of six-cord thread by predecessors of the defendants from 1868 to 1878. The use by these others was less than that by the plaintiffs, but was sufficient to make their thread with these labels known in the markets. The appearance of the spools would to some extent indicate the origin of the thread without reading the names of the makers, and, as more of it was the plaintiffs would more often so represent than that it was others; but the rights claimed by these others in the markets were not resisted and appear to have become well established. When the defendants entered the markets with their label it was compar-
1144 atively as much a representation that their thread was the thread of the others as that it was the thread of the plaintiffs, and they appear to have had as good right there with their labels as the others would have to continue there with theirs. The fact is not found, upon all the evidence, that the use of the label on the plain spool head by the defendants amounts to a representation that the thread came from the plaintiffs.

The embossed numbers do not of themselves indicate origin at all, but the long and exclusive use of them by the plaintiffs may have so associated them with their label and thread that the use of them by the defendants in connection with their label might lead ordinary customers to some extent to think that the thread was from the

plaintiffs. If so, the use of them in that manner by the defendants would amount to a representation so far that the thread of the defendants was that of the plaintiffs. However this may be, but for the patent, the defendants might with equal right have used the numbers as the plaintiffs did. When the patent expired the use became common to all, as if there had never been any patent covering them. The plaintiffs held the monopoly during the term
1145 of the patent subject to the consequences of its expiration. The incidental effect upon the plaintiffs' trade of the use of the numbers by the defendants is one of these consequences. It does not arise from any wrongful invasion of the plaintiffs' rights, but from the rightful exercise of the defendants' rights. The plaintiffs' mode of exercising their monopoly by using the numbers exclusively themselves exposed their trade to what might be inferred from that when the use should become common. The law does not extend the patent beyond its term to protect them from such results. Fairbanks *vs.* Jacobus, 14 Blatchf., 337; Filley *vs.* Child, 16 Blatchf., 376; Wilcox & Gibbs S. M. Co. *vs.* Frame, 21 Blatchf., 431, 17 Fed. Rep., 623; Gally *vs.* Colts' Fire Arms Co., 30 Fed. Rep., 118. The facts of this case as they appear from the proofs do not bring it within the principles of McLean *vs.* Fleming, 96 U. S., 245; Frese *vs.* Bachof, 14 Blatchf., 432; Shaw Stocking Co. *vs.* Mack, 12 Fed. Rep., 707; Carbolic Soap Co. *vs.* Thompson, 25 Fed. Rep., 625; Kinney *vs.* Basch, 16 Am. Law Reg. U. S., 596, and note, and others of the same nature relied upon for the plaintiffs. Much and
1146 repeated consideration of this case discloses no apparent ground upon which the bill can be maintained.

Let a decree be entered dismissing the bill of complaint with costs.

HOYT H. WHEELER.

FREDERIC H. BETTS,
BENJAMIN F. THURSTON,
For Plaintiffs.
WITTER & KENYON,
W. C. WITTER,
For Defendants.

(Endorsed:) Circuit court of the United States for the southern district of New York. J. & P. Coats *vs.* Merrick Thread Co. *et al.* Decision, Wheeler, J. Sept. 28, 1888.
(File-mark:) U. S. circuit court. Filed Sep. 28, 1888. John A. Shields, clerk.

1147 U. S. Circuit Court, Southern District of New York.

Sir PETER COATS *et al.*
vs.
THE MERRICK THREAD CO. and H. F. PALMER. } In Equity. April Term, 1888.

This cause having come on to be heard at the April term of said court and having been argued by Frederic H. Betts and Benjamin

F. Thurston, counsel for complainants, and William C. Witter, counsel for defendants; thereupon and upon consideration thereof it is ordered, adjudged, and decreed that the complainants' bill of complaint be, and the same hereby is, dismissed with costs to the defendants; and the costs herein on the whole case having been duly taxed at the sum of twenty-three hundred and eleven and $\frac{61}{100}$ dollars, it is further ordered, adjudged, and decreed that the complainants pay to the defendants the said sum of twenty-three hundred and eleven and $\frac{61}{100}$ dollars, and that the defendants have execution therefor.

(Signed) HOYT H. WHEELER.

1148 The form of above decree is approved.
N. Y., Oct. 26, 1888.
(S'g'd) B., A., H. & B.

(Endorsed:) U. S. circuit court, southern dist. of New York. In equity. Sir Peter Coats *et al. vs.* The Merrick Thread Co. *et al.* Final decree. Witter & Kenyon, attorneys for def'ts, 32 Park place, New York.
(File-mark:) U. S. circuit court. Filed Oct. 29, 1888. John A. Shields, clerk.

1149 Circuit Court of the United States, Southern District of New York.

Sir PETER COATS *et als.*
vs.
MERRICK THREAD COMPANY.

It is hereby stipulated that the foregoing may constitute the record to be sent by the clerk of this court to the clerk of the Supreme Court of the United States on the appeal to said Supreme Court in the above-entitled cause without prejudice to any motion hereafter to be made to correct the same; and it is further stipulated that the model exhibits in the cause may be retained in the custody of the clerk of this court or in the custody of the respective parties until said hearing on appeal.

New York, Oct. 15, 1889.

(Signed) BETTS, ATTERBURY, HYDE & BETTS.
WITTER & KENYON.

Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

Sir PETER COATS, THOMAS COATS, JAMES COATS, Archibald Coats, James Coats, Jr., Thomas Glen Coats, Peter Coats, Jr., and George Coats, Doing Business under the Firm Name of J. and P. Coats,
vs.
THE MERRICK THREAD COMPANY and HERBERT F. PALMER.
} In Equity.

To the honorable the Supreme Court of the United States:

The appeal of Sir Peter Coats, Thomas Coats, James Coats, Archibald Coats, James Coats, Jr., Thomas Glen Coats, Peter Coats, Jr., and George Coats, the above-named complainants and appellants, respectfully show:

That on the 30th day of June, 1883, these complainants and appellants filed their bill in equity in the circuit court of the United States for the southern district of New York against the
1151 above-named defendants and appellees, which said bill of complaint was allowed to be amended on final hearing. In the said bill of complaint as amended it was alleged that the plaintiffs are doing business under the firm name of J. and P. Coats and are, by and through the Conant Thread Company, in which they own a controlling interest, manufacturers and sellers of sewing thread on spools at Pawtucket, in the State of Rhode Island, and at Paisley, Scotland, in the kingdom of Great Britain.

It was also alleged in said bill of complaint that said firm of J. and P. Coats had been engaged in the manufacture and sale of sewing threads on spools since 1830, and that since 1840 their thread had been and still is largely sold in the United States, and that since the year 1869 said firm had been engaged in the manufacture of said thread at Pawtucket, Rhode Island.

The complainants further set forth that the business of the complainants so conducted was very large and valuable and steadily increasing for many years past; that the quantity of such thread
1152 sold was very large, and that the complainants had gone to an expense of many thousand dollars in order to make a superior article, and that such thread was known to the trade as "J. and P. Coats'" thread and by their designation, figures, labels, and marks, and that such names, marks, and designs of "J. and P. Coats' thread" are everywhere recognized as a guaranty of a first-class and reliable thread; that the complainants wound the thread made and sold by them on spools of 200 yards length, except the thread known as "best spool cotton," and distinguished by the numbers from 100 to 200, inclusive, and that such thread is composed of six separate strands twisted together and is known as "six-cord" thread, and was by them first designated and has always since been designated by said complainants as "best six-cord;" that except as hereinafter set forth thread composed of less number of strands than six when made by the complainants was wound in longer

lengths than two hundred yards and on larger-sized spools with labels, all serving to distinguish them from the "six-cord" thread, and as to the finer numbers from 110 to 200 when wound
1153 upon 200-yards spools had a label containing the following inscription: "J. and P. Coats' best spool cotton, 200 yards," with the ends of the spools whereon said thread was wound embossed with a design wholly unlike those used for six-cord thread and without any numerals thereon.

And the bill of complaint further set forth that in order to prevent imitations of said "best six-cord" thread the complainants have adopted distinguishing designs, labels, and marks from time to time, as follows: From about 1842 continuing to the present time their style, "J. and P. Coats," with the quantity reeled on each spool and a designating number and the words "best six-cord," were and are all disposed in a particular or fixed manner and so placed and lettered and numbered on a circular black and gilt label upon the end of every spool before sale, and such circular label, with such words and figures so disposed thereon, has always been one of the designating trade-marks of said complainant in the United States of America; that the distinguishing characteristics of the complainants'
1154 label so continuously used by them since the year 1843 have been and are as follows: The label is circular; the ground color of the label has been and is light gold. Near the margin is a black or substantially black line. Inside said line, having substantially black letters on a light gold ground, is the firm's name with the words "best six-cord." In the centre of the label is a substantially black circle and the number of the thread—8, 10, 12, 16, 20, 24, 30, 36, 40, 46, 50, 60, 70, 80, 90, or 100, as the case may be—is in gold colors upon said centre, and said centre also bears the letters and figures "200 yds." in small characters.

And it was further set forth in said complaint that prior to the year 1869 the heads of spools whereon plaintiffs manufactured thread was wound were ornamented only by paper label such as hereinabove described, the surface of the natural wood being either perfectly smooth or else simply stamped with *with* some common ornamental design.

And it was further set forth in said complaint that in or about the year 1869 the complainants were the first — or conceived or adopted the idea of embossing upon the natural wood and
1155 upon the outer edge of the heads of spools used by them numerals corresponding with those used upon the paper labels pasted upon the centre of such spool heads, and that among the other objects of thus embossing such numerals the complainants desired to give a distinctive appearance to their spools and indicate by the appearance and design of such spool heads and such embossed numerals thereon the origin and manufacturers of the thread upon all spools bearing such embossment upon the spool heads, to wit, that the same was of the manufacture of J. and P. Coats; that on the 9th day of February, 1875, the complainants, being then in the exclusive possession and use of the aforesaid trade-marks, obtained the registration of a trade-mark at the United States Patent Office, at

Washington, the specification for which was set forth *in extenso* in said bill of complaint.

And the said complaint further set forth that the spool-head ornamentation set forth in said trade-mark had been used by them since the autumn of 1873 and is still in use by them, all the six-cord spool thread now manufactured or sold by them (except those known as "long lengths," as hereinafter referred to) having upon the spool heads the essential features of said trade-mark. There was
1156 annexed to said complaint a schedule showing samples of spool heads so used by the plaintiffs.

In the said complaint it was further set forth as evidence of the importance attached by these complainants to the use of the border of the natural color of the wood of the spool embossed as thereinbefore stated that on or about the 12th day of March, 1878, the complainants had applied for and obtained the registration in the United States Patent Office of an additional trade-mark for spool cotton or cotton thread to be affixed to packages, counter boxes, cases, or wrappers of the goods used on advertising signs or labels, the same having been used by the plaintiffs for more than two years prior thereto; that the said trade-mark consisted in the representation of a spool of thread upon a red ground, said spool lying with one end fully shown but somewhat in perspective, the central part of the end so shown representing a circular label such as is usually affixed to spools of thread; that upon said circular label are numerals or words, or both, the characters upon the label or the colors of the label itself being in no respect an essential feature of this trade-mark; that the color of the spool is the natural color of the wood, the end as shown bearing ornamental impressions and
1157 numerals, which numerals vary on different spools. Copies of said trade-mark and the design accompanying the same were annexed to the bill of complaint.

The complaint further set forth that said last-mentioned trade-mark had been used by the complainants in their business and upon the goods manufactured and sold by them since about the year 1875 or 1876, and is still used by them.

And it was further set forth in said complaint that as evidence of the importance attached by them to the use on spools of a peripheral border of natural wood color having numerals embossed thereon the complainants adopted about the year 1875 and commenced the use of a varied form of the above device for the protection of the thread manufactured and sold by them. The distinguishing characteristic and essential features of such mark were and are a spool head ornamented with two concentric circular bands of the natural wood, the outer band embossed with an ornamental design composed of lines or lines and stars combined with a numeral repeated at intervals and the inner band unembossed and unornamented except stamped with the words "J. and P. Coats' best six-cord."
1158 A copy of said mark was annexed to the complaint as one of the schedules, and it was also stated in said complaint that that form of mark was and is used only upon spools contain-

ing what is known in the trade as "long lengths"—that is, more than 200 yards of thread upon a larger size spool.

It was further alleged in said complaint that all and every the said distinguishing labels, marks, or trade-marks had been upon the spools of the said thread which had been prepared by the said J. and P. Coats and sold in the United States of America for many years past; it was further alleged in said complaint that the defendant-The Merrick Thread Company are a corporation having their principal place of business at Holyoke, Mass., and an office for the transaction of business in the city of New York, and that the defendant Herbert F. Palmer was the agent of said corporation in the said city of New York.

The complaint then set forth that the defendant company are manufacturers of spool thread of the same general character but of inferior quality to the plaintiffs' thread, and that they manufacture three-cord thread on spools in lengths of 200 yards of inferior grade and strength to that known as six-cord thread, and also manufacture and sell six-cord thread on spools in lengths of 200 yards,
1159 and that all of the kinds and styles of thread manufactured by the defendant company were sold in the city of New York by the defendant Palmer; that the complainants manufactured and sold on spools in lengths of 200 yards and of the numbers below and inclusive of No. 100, as hereinabove set forth, none but six-cord thread, as above set forth, and the defendants came into competition with them only as to that variety of thread and not as to the "three cord" thread on spools in lengths of 200 yards and of the numbers aforesaid.

The defendant company on the spools containing said "three-cord" thread in lengths of 200 yards and of the numbers from 8 to 100, inclusive, have paper labels wholly unlike in color and design to any labels used by the plaintiffs, and the natural wood of the spool head that surrounded said labels was perfectly smooth and without any decoration or embossment whatever.

And it was further alleged in said complaint that in or about the month of August, 1879, the plaintiffs first learned that spool heads bearing an embossment and mark closely resembling their
1160 own, and especially the distinguishing marks or symbols of the plaintiffs hereinabove set forth, were being used by the defendants The Merrick Thread Company on "six-cord" thread; that upon notice from the plaintiffs' attorneys that they infringed the trade-marks of the plaintiffs the defendants, as the complainants believe, ceased to use said spool heads and marks simulating and resembling those of the complainants.

The complaint further set forth that thereafter the complainants learned that the defendants had for some time past been guilty of unlawful and unfair competition in business, in this: that they had been selling in competition with the complainants a spool thread of six-cord and put upon spools of 200-yards lengths, which thread, though not manufactured by the plaintiffs, *were* put upon the market and sold as the plaintiffs' thread by reasons of the labels, marks, and devices upon the spool whereon said thread is wound;

and the complaint set forth that the defendants, personally or by their clerks or agents, had disposed of said thread with labels
1161 upon the spools made in colorable imitation of the plaintiffs' labels and with a spool head embossed with a colorable imitation of the spool-head device used by the plaintiffs and intended as a counterfeit of said device and of the trade-mark used by the plaintiffs.

The complaint further averred that said marks, embossment, and label are a simulation or infringement upon the marks of J. and P. Coats hereinabove set forth, and set forth also in the 5th, 6th, and 7th clauses of said bill of complaint, and especially of the labels, trade-marks, and distinguishing marks and symbols described and set forth in said 5th, 6th, and 7th clauses.

The complaint further alleged that said marks, symbols, and labels were similarly used and sold by the defendants conjointly and together upon single spools. The complaint then set forth that the defendants had openly and knowingly sold such thread bearing such simulated and fraudulent labels and marks at their offices in the city of New York and elsewhere in the United States, and that by such sales the defendants have been the means of passing
1162 off such thread upon customers to a considerable extent as and for the genuine thread of "J. & P. Coats."

That said thread so dealt in by the defendants was as to its labels, designs, and engravings got up through the instrumentality, order, or sanction of the defendant- in imitation of and so as to have the general appearance of the said thread of the plaintiffs, so that the same may pass by sale through deception on account of the resemblance as the genuine thread of the complainants; that through this infringement and imitation the defendants obtained the profit and advantage of the plaintiffs' name, style, and reputation in such sale and deprived the plaintiffs of the market which they had originally and lawfully obtained.

And the bill of complaint further set forth that the defendants had made large sales of such thread and, still having large quantities of the simulated article on hand for sale, have deprived and will deprive these plaintiffs of a large profit to which they are entitled, to their great damage; that by reason of said fraudulent acts of defendant- the plaintiffs were deprived of sales which they
1163 would otherwise make and enjoy of their said thread in the cities of New York and elsewhere in the United States, and that said simulated article being of inferior quality and made at less cost and with less care is sold by these defendants at a price less than that for which the plaintiffs would readily sell their thread, and that said spurious and simulated article of thread is gotten up with a view to impose the same upon dealers and retailers as the plaintiffs' genuine thread; and the complainant- further alleged that by the said unlawful acts of the said defendants these complainants have been greatly damaged.

Relief was demanded in said complaint; first, that the defendants and their agents be restrained by injunction order from infringing the trade-mark or unfairly competing with the plaintiffs

by simulating the marks and symbols specified in said complaint, and the complaint also prayed for an accounting by defendants of profits of which these complainants have been deprived by the sales of thread bearing such simulated marks and the damages the
1164 complainants have sustained by means of the frauds and premises aforesaid, and also that a receiver be appointed of all thread on hand bearing such simulated marks, and the complaint also prayed that the defendants may be ordered and adjudged to pay said damages and profits when ascertained and for a perpetual injunction in the premises and for the issuing of a subpœna. The said complaint was verified.

And the appellants further show to this honorable court that thereafter these defendants filed their answer to said complaint, which answer was verified on the 16th day of January, 1884; that said answer admitted the citizenship of the complainants and the incorporation of the defendants' company, but neither admitted or denied the copartnership of the plaintiffs or whether they derived their business through the Conant Thread Company, nor any of the allegations of the complaint respecting the commencement, growth, or size of the business of the complainants, and, while it admitted that complainants' thread was known to the trade as "J. and P. Coats' thread," denied that it was thus known by reason of any designations, figures, labels, or marks other than the
1165 said name being affixed to the spools and boxes containing said thread.

The defendants in their answer denied the averments contained in the complaint touching the character and quality of complainants' thread, their reputation or the alleged guaranty conveyed by the marks of "J. and P. Coats'" thread. The answer further denied that all the thread manufactured and sold by complainants wound on spools of 200 yards length had been composed of six separate stands twisted together, or that all of such thread so wound has been or is "six-cord" or "best six-cord" thread, and, while it admitted that twisting six separate strands together conferred extra strength and durability of thread, left the complainants to prove whether they first designated such thread as "best six-cord," but admitted that such thread had been called best six-cord by the complainants.

The answer further denied that all of plaintiffs' thread composed of less than six strands have always been distinguished plainly from six-cord thread, and denied the allegations in the complaint contained as to the winding of three-cord thread.

1166 The answer denied the adoption of the marks referred to in the complaint as distinguishing plaintiffs' thread or being so recognized by the trade or being regarded as furnishing a peculiar guaranty of genuineness of the goods having such designs and put in issue the remaining allegations of the bill of complaint, with the exception that it further admitted (1) the registration of the trademark No. 2213; (2) the allegations as to defendants' place of business and its business; (3) the quality and nature of three-cord 200-yard thread made by defendants; (4) that the defendants manufact-

ured "six-cord" thread on spools in lengths of 200 yards; (5) that the labels on spools of "three-cord" 200-yard spools are wholly unlike in color or design to any used by complainants and are as described in said complaint; (6) that the defendants manufacture and sell "six-cord" thread on larger spools, in lengths of more than 200 yards, and similarly charge the complainants; (7) the receipt of the letter from the complainants as stated in the bill of com-
1167 plaint; all other allegations in said bill of complaint were practically placed in issue by the answer, which concluded with a prayer for dismissal.

And these appellants further show to this court that issue was joined herein by filing of replication on or about April 5th, 1884; that thereupon testimony for final hearing was taken by the respective parties, and on June 21st, 1888, the case came on for final hearing and was argued for the respective parties before the Honorable Hoyt H. Wheeler; that on Sept. 21st, 1888, Judge Wheeler filed his decision dismissing the said bill of complaint.

And these appellants further show to this honorable court that on the 9th day of October, 1888, an interlocutory decree was entered in the circuit court of the United States for the southern district of New York dismissing the said bill of complaint in the following language:

U. S. Circuit Court, Southern District of New York.

Sir PETER COATS *et al.*
vs.
1168 THE MERRICK THREAD CO. and H. P. PALMER. } In Equity. April Term, 1888.

This cause having come on to be heard at the April term of said court and having been argued by Frederic H. Betts and Benjamin F. Thurston, counsel for complainants, and William C. Witter, counsel for defendants, thereupon and upon consideration thereof it is ordered, adjudged, and decreed that the complainants' bill of complaint be, and the same hereby is, dismissed with costs to the defendants to be taxed.

Oct. 3, 1888.

(S'g'd) HOYT H. WHEELER.

The appellants further show that thereafter and on the 25th day of October, 1888, said costs were taxed at $2,311.61.

And the appellants further show that on the 29th day of Oct., 1888, a final decree was entered herein in the office of the clerk of the U. S. circuit court for the southern district of New York, in the following language:

1169 U. S. Circuit Court, Southern District of New York.

Sir PETER COATS *et al.* } In Equity.
vs. } April Term, 1888.
THE MERRICK THREAD CO. and H. P. PALMER. }

This cause having come on to be heard at the April term of said court and having been argued by Frederic H. Betts and Benjamin F. Thurston, counsel for complainants, and William C. Witter, counsel for defendants, thereupon and upon consideration thereof it is ordered, adjudged, and decreed that the complainants' bill of complaint be, and the same hereby is, dismissed with costs to the defendants.

And the costs herein on the whole case having been duly taxed at the sum of twenty-three hundred and eleven and $\frac{61}{100}$ dollars, it is further ordered, adjudged, and decreed that the complainants pay to the defendants the said sum of twenty-three hundred and eleven and $\frac{61}{100}$ dollars, and that the defendants have execution therefor.

1170 Wherefore the above-named complainants and appellants appeal from the whole of said final decree of said circuit court to the Supreme Court of the United States, and respectfully pray that the said final decree of said circuit court, together with the pleadings, depositions, evidence, and proceedings in said cause, may be sent to the Supreme Court of the United States without delay, and that the Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court may be reversed or such other decree made as to the Supreme Court shall seem just.

(S'g'd) J. AND P. COATS,
By JAS. COATS,
A Member of said Firm.
(S'g'd) JAS. COATS.

(S'g'd) VARNUM & HARRISON,
Solicitors for Compl't-.
(S'g'd) FREDERIC H. BETTS, *Of Counsel.*
(S'g'd) JAMES M. VARNUM, *Of Counsel.*

1171 STATE OF RHODE ISLAND, } *ss:*
County of Providence, }

James Coats, being duly sworn, deposeth and saith that he is a member of the firm of J. and P. Coats, one of the appellants herein, and that he has read the foregoing appeal signed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

(S'g'd) JAS. COATS.

Sworn to before me this 5th day of November, 1888.
WILMARTH H. THURSTON,
[NOTARIAL SEAL.] *Notary Public.*

The above appeal is hereby allowed.
(Signed) E. HENRY LACOMBE.

(Endorsed:) U. S. circuit court, southern district of New York. Sir Peter Coats *et al.* against The Merrick Thread Co. Appeal. Varnum & Harrison, solicitors for complainants, 31 Nassau street, New York.

1172 Service of within appeal is hereby admitted Nov. 7, 1888.
(S'g'd) WITTER & KENYON,
Def'ts' Sol'rs.

(File-mark:) U. S. circuit court. Filed Nov. 8, 1888. John A. Shields, clerk.

1173 UNITED STATES OF AMERICA, *ss:*

To the Merrick Thread Company and Herbert F. Palmer, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, 1889, pursuant to an appeal filed in the office of the clerk of the circuit court of the United States for the southern district of New York, wherein Sir Peter Coats, Thomas Coats, James Coats, Archibald Coats, James Coats, Jr., Thomas Glen Coats, Peter Coats, Jr., and George Coats are appellees, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated at New York city the 7 day of November, 1888.
(Signed) E. HENRY LACOMBE, *Judge.*

1174 (Endorsed:) U. S. circuit court, southern district of New York. Sir Peter Coats *et al. vs.* The Merrick Thread Co. *et al.* Citation. Varnum & Harrison, solicitors for compl'ts, 31 Nassau street, New York. Service of within citation is hereby admitted. New York, Nov. 7, 1888. (S'g'd) Witter & Kenyon, def'ts' sol'rs.
(File-mark:) U. S. circuit court. Filed Nov. 8, 1888. John A. Shields, clerk.

1175 U. S. Circuit Court, Southern District of New York.

Sir PETER COATS, THOMAS COATS, JAMES COATS, ARCHIBALD Coats, James Coats, Jr., Thomas Glen Coats, Peter Coats, Jr., and George Coats, Doing Business under the Firm Name of J. and P. Coats,

vs.

THE MERRICK THREAD COMPANY and HERBERT F. PALMER.

Know all men by these presents that we, Edgar S. Auchincloss and John W. Auchincloss, are held and firmly bound unto the above The Merrick Thread Company and Herbert F. Palmer in the sum of four thousand six hundred and twenty-three dollars and twenty-two cents, to be paid to the said The Merrick Thread Company and

Herbert F. Palmer; for the payment of which, well and truly to be made, we bind ourseles and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

1176 Sealed with our seals and dated the third day of November, 1888.

EDGAR S. AUCHINCLOSS. [L. S.]
JOHN W. AUCHINCLOSS. [L. S.]

Whereas the above-named Sir Peter Coats, Thomas Coats, James Coats, Archibald Coats, James Coats, Jr., Thomas Glen Coats, Peter Coats, Jr., and George Coats have prosecuted an appeal to the Supreme Court of the United States to reverse the final decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of the obligation above mentioned is such that if the above-named Sir Peter Coats, Thomas Coats, James Coats, Archibald Coats, James Coats, Jr., Thomas Glen Coats, Peter Coats, Jr., and George Coats shall prosecute said appeal to effect and answer all damages and costs if they shall fail to make their plea good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

EDGAR S. AUCHINCLOSS. [L. S.]
JOHN W. AUCHINCLOSS. [L. S.]

Sealed and signed in the presence of—

(S'g'd) CHAS. E. WAHLE, JR.

1177 UNITED STATES OF AMERICA, } ss:
Southern District of New York, County of New York, }

Edgar S. Auchincloss and John W. Auchincloss, each being duly sworn, deposes and says, and each for himself, that he is worth the sum of four thousand six hundred and twenty-three dollars and twenty-two cents over and above all his just debts and liabilities, and said Edgar S. Auchincloss for himself says that he is a freeholder in said city and county of New York.

(S'g'd) EDGAR S. AUCHINCLOSS.
JOHN W. AUCHINCLOSS.

Sworn to before me this 3rd day of November, 1888.

(S'g'd) CHAS. G. F. WAHLE,
[NOTARIAL SEAL.] *Notary Public* (82), *N. Y. Co.*

(Endorsed:) U. S. circuit court, southern district of New York. Sir Peter Coats against The Merrick Thread Company. Bond on appeal. Varnum & Harrison, solicitors for compl'ts, 31 Nassau St., New York. Bond approved as to form. (S'g'd) Witter & Kenyon,

def'ts' sol'rs. The within bond approved as to form, amount,
1178 and sufficiency of the sureties. N. Y., Nov. 7, 1888. (Signed) E. Henry Lacombe. Due service of within bond is hereby admitted. Nov. 7, 1888. Witter & Kenyon, def'ts' sol'rs.

(File-mark :) U. S. circuit court. Filed Nov. 8, 1888. John A. Shields, clerk.

1179 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one (1) to eleven hundred and seventy-eight (1,178), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Sir Peter Coats, Thomas Coats, James Coats, Archibald Coats, James Coats, Jr., Thomas Glen Coats, Peter Coats, Jr., and George Coats, doing business under the firm name of J. and P. Coats, against The Merrick Thread Company and Herbert F. Palmer, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 17th day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the said United States the one hundred and fourteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 13,878. S. New York C. C. U. S. No. 261. Sir Peter Coats, Thomas Coats, James Coats, Archibald Coats, James Coats, Jr., Thomas Glen Coats, Peter Coats, Jr., and George Coats, appellants, *vs.* The Merrick Thread Company and Herbert F. Palmer. Filed October 22, 1889.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

IN EQUITY.—No. 261.

SIR PETER COATS ET AL.,
Appellants,

vs.

THE MERRICK THREAD COMPANY ET AL.,
Appellees.

BRIEF FOR APPELLANTS.

VARNUM & HARRISON,
Solicitors for Appellants.

FREDERIC H. BETTS,
Of Counsel.

C. G. BURGOYNE, Cor. Centre and Walker Sts., New York.

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BRIEF FOR APPELLANTS.

I.

Statement of Case.

This case comes here on appeal by the complainants from a decree of his Honor, Judge WHEELER, sitting as Circuit Judge of the United States, in the Southern District of New York, dismissing the bill of complaint.

The opinion of the Circuit Court is found on page 736 of the Record.

The case is not strictly a case of infringement of a trade-mark, as such, although the bill of complaint sets up the registration in behalf of Messrs. J. & P. Coats, of several trade-marks, one of which

covers the distinctive characteristics and appearance of a spool of thread as put up by them, as that spool goes into the hands of the consumer. The case, however, is not rested wholly upon the charge of infringement of this technical trade-mark, but is based broadly upon the charge of "unfair trading" by the defendants in imitating a trade property, consisting of a combination of features in form, style, color and arrangement of spool heads and labels, which by long association and use has come to be a guarantee to the public of the origin and genuineness of the complainants' goods.

The gravamen of the bill of complaint, as stated in the thirteenth clause (p. 8), is:

> "That the defendants have, for some little time past, been guilty of unlawful "and unfair competition in business, in this, that they have been infringing the "rights of the plaintiffs in and to the marks, symbols and labels specified in the "fifth, sixth and seventh clauses hereof by selling, in competition with these plaint-"iffs, a spool thread of 'six cords,' and put up in spools of two hundred yards' "length, which thread is not manufactured by these plaintiffs, but is put upon the "market and sold, and spread among retailers and customers, as well in the City of "New York as in other and distant parts of the United States, as and for the thread "of these plaintiffs, by reason of the labels, marks and devices upon the spools "whereon said thread is wound."

The charge is also that this simulation of the distinguishing marks and appearance of the Coats, spools was with full knowledge on the part of the defendants of the previous and exclusive use by the Messrs. Coats of the combination of features referred to in the bill and of their great reputation and popularity in the market, and with the design of availing themselves of the advantages to be thereby derived from deceiving unwary customers by the similarity of the appearance and get up of the spools (p. 9).

The charge is, further, that the deception, mistakes and confusion which would naturally occur, have in fact occurred, to the great injury of the complainant's business (p. 9).

In short, the charge is that of "unfair trading"; of an attempt on the part of the defendants, and so far a successful one, to palm off their thread as the thread of the complainants by means of a simulation of the appearance and dress of the complainant' goods; of a plan, deliberately formed and skillfully carried out, for a compara-

tively new concern to build up a business upon the reputation and at the expense of the oldest and best-known manufacturers of spool cotton in the world.

The Court below decided that the defendants had made no unlawful use of the complainants' property, resting its decision largely on the ground that *one element* entering into the trade-mark registered by the complainants, and which consisted of a *combination* of marks, designs and labels of complainants, had *once* been the subject of a design patent, which had previously expired, and that the defendants had done no more than exercise their legal rights to the use of the design of this expired patent ; and, therefore, dismissed the bill of complaint.

From this decision the complainants now appeal to this Court.

II.

Assignment of Errors.

1st. The Court below erred in holding that

" When the defendants entered the markets with their labels it " was comparatively as much a representation that their thread was " the thread of the others as that it was the thread of the plaintiffs, " and they appear to have had as good right there with their labels " as the others would have to continue there with theirs."

2d. The Court below erred in not holding that the *embossed numerals* on the *natural-colored peripheral border* of spool heads *in combination* with a small paper label with *black centre* and *surrounding gold band*, as exclusively used for a number of years by the complainants on the ends of their spools of 200-yard six-cord spool cotton, had come by such long use and association to be a recognized badge of complainants' goods, and amounted to a representation to the public of the origin of the complainants' thread.

3d. The Court below erred in not holding that the use, by the defendants, on the heads of their spools of 200-yard six-cord spool cotton, of embossed numerals on the natural-colored peripheral border of the spool head in combination with a small paper label with black centre and gold band was intended, and calculated, and likely to deceive ordinary purchasers and to lead them to think that the defendants' thread, on spools so *characterized*, was the thread of the complainants.

4th. The Court below erred in not holding that the defendants had adopted the above-described characteristic appearance of spool head on their 200-yard six-cord spool cotton, knowing of the exclusive use of the same by the complainants and that the complainants' thread was known and recognized by said appearance, and with the intention of thereby deceiving and defrauding the public.

5th. The Court below erred in holding that the expiration of the Conant design patent No. 3949 authorized the defendants to make use of the peculiar *combination* of characteristic marks of spool heads used by the complainants.

6th. The Court below erred in holding that the effect upon the complainants' trade of the imitation by the defendants of the the complainants' spool heads was one of the consequences to which the complainants' property right was subject on the expiration of the Conant design patent.

7th. The Court below erred in holding that the use of alternate numerals and stars embossed upon the natural-colored peripheral border of spool heads in combination with a small paper label with black centre and surrounding gold band became free to the defendants on the expiration of the Conant design patent.

8th. The Court below erred in holding that the defendants' acts were not a wrongful invasion of the complainants' rights, but only the rightful exercise of the defendants' rights.

9th. The Court below erred in holding that

"The facts of this case, as they appear from the proofs, do not "bring it within the principles of *McLean vs. Fleming*, 96 U. S., "245; *Frese vs. Bachof*, 14 Blatchf., 432; *Shaw Stocking Co. vs.* "*Mack*, 12 Fed. Rep., 707; *Carbolic Soap Co. vs. Thompson*, 25 "Fed Rep., 625; *Kinney vs. Basch*, 16 Am. Law. Reg., U. S., 596, "and note, and others of the same nature relied upon for the "plaintiffs."

10th. The Court below erred in not holding that the defendants had infringed the complainants' trade-mark of February 9, 1875.

11th. The Court below erred in not holding that the defendants had been guilty of "unfair trading."

12th. The Court below erred in dismissing the bill of complaint.

13th. The Court below erred in decreeing to the defendants the costs of this suit.

The first assignment of error is based on the ground that the finding of the Judge as to the use of black and gold paper labels by third parties is immaterial and irrelevant. In the first place, this action is founded on the imitation by the defendants of the whole ornamentation of the complainants' spool heads, and not of the paper label alone. There is no pretense that any of the other thread manufacturers ever used embossed numerals in combination with their labels on the heads of their spools. And, in the second place this action is founded on the fraud of these defendants, and if they have been guilty of "unfair trading," it is no answer for them to say that others have been permitted to use black and gold labels somewhat resembling the complainants'.

See McLean vs. Fleming, 96 U. S., 245, 257; Menendez vs. Holt, 128 Id., 514, 523.

The second and third assignments of error. Judge WHEELER found that

"The long and exclusive use of them [*i. e.*, embossed numerals] by the plaint-"iffs *may* have so associated them with their label and thread that the use of them "by the defendants in connection with their label *might* lead ordinary purchasers "*to some* extent to think that the thread was from the plaintiffs."

So far the Judge was correct, but he did not go far enough. The evidence clearly shows that the embossed numerals and label as used for years on the complainants' spools *had, in fact,* become so associated with their thread that the use of them as they were used by the defendants *had in a great many instances* lead customers to think that their thread was the complainants, and that such imitation was calculated and intended to deceive the public. We submit that he should have so found.

The evidence as to the use of, and the extent to which the complainants' thread was known by, the distinctive ornamentation of their spools is reviewed on pages 20 to 39 of this brief. The evidence as to the effect of the defendants' simulation of the distinctive appearance of the complainants' spools is found collected on page 39 and pages 61 to 92 below.

The fourth assignment of error. The evidence clearly shows a fraudulent intent underlying the whole course of the defendants' acts. The Judge, however, failed to make any such finding and, at least impliedly, negetives any such intent. This, we allege, was error. The question of a fraudulent intent is a vital one in cases of "unfair trading," as is shown by the cases we cite on pages 8 to 20 below. The evidence bearing on this point will be found on pages 43 to 69 below.

The fifth, sixth, seventh and eighth assignments of error all relate to Judge WHEELER's findings and conclusions as to the effect of the expiration of the Conant design patent. The scope of this patent and its effect on the complainants' registered trade-mark treated of is on pages 92 to 99 below. The whole question as to its effect on the complainants' acquired trade property and the authorities are discussed in the sixth point of our brief at page .

The ninth, tenth, eleventh and twelfth assignments of error are general, and relate to Judge WHEELER's final disposition of the case by his dismissal of the bill of complaint. The principal underlying the decisions in cases of "unfair trading" is discussed in the third point of our brief (p. 7). The evidence supporting the charge of "unfair trading" made against these defendants is reviewed in the

fourth point of our brief below (p. 20 to 92). We submit that the facts proved make out a clear case of "unfair trading" within the authorities cited, and that, therefore, Judge WHEELER was in error in holding that the facts did not bring the case within the principle of *McLean vs. Fleming* and the other cases, and in consequently dismissing the bill.

III.

Statement of Law Applicable to Case.

The law of trade-marks, as now defined and limited by statute, is well established. This Court has laid down general rules as to what is and what is not entitled to protection as a trade-mark in the case of *Canal Co. vs. Clark*, 13 Wall., 311, and has defined what constitutes an infringement of a legally acquired trade-mark in *McLean vs. Fleming*, 96 U. S., 245.

There is, however, another class of cases, broad as the jurisdiction of equity for the prevention of frauds, which recognizes a property right in a manufacturer or dealer to a word, or sign, or form of package, or general appearance and make-up of his goods, and protects that property, *as against an intentional imitator*, irrespective of the question of exclusive title to such words and marks and appearances, or of the question whether, in themselves, they indicate origin or ownership, and are, therefore, capable of acquisition or registration as technical trade-marks. These cases are known as cases of "unfair trading" or cases *analagous* to trade-marks. They include all cases of frauds committed respecting trade properties, names and marks which, from their nature, are not trade-marks, properly so-called, and thus supplement the law of trade-marks. The dividing line between the two classes of cases has not been very closely drawn in the past. In fact, for long years no distinction was made between them, but all were grouped together under the broad and, perhaps, loosely used term of trade-mark cases..

Both trade-mark cases, and cases analagous to trade-marks had their origin in the same broad principle of equity, namely, that it is a fraud for one man to pass off his goods on the reputation of another, or to so designate or dress up his goods as to misrepresent them to the public as the goods of an established house. It not only is a fraud upon the one whose goods are simulated, but is also a fraud upon the public.

The underlying principle of these early cases is stated by Lord LANGDALE, in *Perry vs. Truefitt*, 6 Beav., 66, to be that

> " A man is not to sell his own goods under the pretense that they are the goods " of another man. He cannot be permitted to practice such a deception, nor use " the means which contribute to that end. He cannot, therefore be allowed to use " names, marks, letters or other indicia by which he may induce purchasers to " believe that the goods which he is selling are the manufacture of another person."

And he adds :

> " I own it does not seem to me that a man can acquire a property merely in a " name or mark ; but whether he has or not a property in the name or mark I have " no doubt that another person has not a right to use that name or mark for the " purpose of deception in order to attract to himself that course of trade or that " custom which without that improper act would have flowed to the person who " first used, or was active in the habit of using, the particular name or mark."

And again in *Croft vs. Day*, 7 Beav., 84, he says :

> " You may express the same principle in a different way, and say that no man " has a right to dress himself in colors or adopt and bear symbols, to which he has " no particular or exclusive right, and thereby personate another person for the " purpose of inducing the public to suppose either that he is that other person or " that he is connected with and selling his own. It is perfectly manifest that to do " these things is a fraud and a very grave fraud."

From this common origin, viz.: the jurisdiction of equity for the prevention of fraud, one class of cases was developed, first, along the line of a property right *(Clark vs. Freeman*, 11 Beav., 112), and then of an exclusive property right *(Millington vs. Fox*, 3 Myl. & Cr., 338), and finally, under the registration act passed into a technical, well-defined and exclusive statutory right *(Canal Co. vs. Clark, supra)*. A right so absolute could not be created without correspondingly strict limitations, and hence, we find it decided that generic names and geographical names, words denoting quality, words

of description and the like, are not, from their nature, capable of registration as trade-marks, because no one individual is entitled to their exclusive use.

It is true, however, that the origin of an article of manafacture may, under certain circumstances, be as definitely indicated, and, perhaps, *more effectually* indicated, to the great mass of purchasers by *general appearance* than by specific marks, or by words and marks which are the common property of the whole world, than by those which may be made the exclusive property of an individual under the provisions of the registration acts. So, too, the fraud on the individual and on the public may be just as great in case of the simulation of the distinctive marks or general appearance of the goods of a manufacturer or dealer as in the case of the infringement of a technically registered trade-mark.

Instances are undoubtedly to be found of failure to grant relief against parties who have studiously imitated the appearance, style, packages and form of putting up or dressing popular goods for the market, because the act was done without violating what the Court, under the view that the statutes had restricted their powers, had strictly defined as a trade-mark.

The broad principle of equity, however, still remains, and is amply sufficient to meet the requirements of all such cases. The misfortune was that the one class, in its development, carried with it the name of the whole family, leaving the other class for a time without a name, and consequently neglected.

But of recent years, courts of equity have upheld a higher rule of morality in trade than was to be gathered from the earlier cases. We find, to-day, a well-established class of cases, recognized everywhere, known as cases of "unfair trading," a class new in name only, but in reality none other than that class of cases left nameless by the development of the trade-mark.

The distinction between the two classes of cases is briefly summarized in a recent article in the Harvard Law Review, Vol. IV., at page 332, as follows :

"To recapitulate in a few words what I believe to be of the law of trade-mark "as distinguished from the principle which already is, or is to become, the law of "cases analogous to trade-marks: A trade-mark is a definite and techical sign "which is capable of registration as the exclusive right of an individual, and there "will be no relief, whether there is fraud or not, unless there is a technical "breach of that mark. In cases analogous to trade-marks, fraud is the gist of the "action, and where fraud is found the Court is able to give equitable relief, whether "there is a breach of a technical right or not; and the relief may extend to what-"ever acts cause the damage complained of, whether or not the acts would be a "breach of the plaintiff's right in the case of a trade-mark proper."

One class of cases (trade-marks) is dependent upon the plaintiff's right, the other class (unfair trading) upon the defendant's fraud.

The English Courts have uniformly upheld an increasing high standard of morality in trade through a long course of decisions, beginning with *Seixo vs. Provezende*, L. R., 1 Ch. App., 192, and including *Lee vs. Haley*, 5 *Id.*, 155; *Wotherspoon vs. Currie*, L. R., 5 H. of L., 508; *Ford vs. Foster*, L. R., 7 Ch. App., 611; *Johnston vs. Orr Ewing*, L. R. 7, App. Cas., 219; *Read vs. Richardson*, 45 L. T. (N. S.), 54; *Thompson vs. Montgomery*, L. R., 41 Ch. D., 35, and same case in the House of Lords, L. R., 1891, 1 App. Cas., 217; *Hart vs. Colley*, L. R., 44 Ch. D., 193; *Eno vs. Dunn*, L. R., 15 App. Cas., 252, and *Reddaway vs. Bentham Hemp-spinning Company*, L. R., 1892, 2 Q. B. D., 639.

These cases are all familiar to this Court, several of them having been cited with approval on two or three recent occasions. We wish, nevertheless, to call attention to the express language used in some of them:

In *Lee vs. Haley*, Lord Justice GIFFORD says (p. 161):

"I quite agree that they [the plaintiffs] *have no property in the name*, but "the principle upon which the cases on this subject proceed is *not that there* "*is property in the word, but that it is a fraud* on a person who has established "a trade, and carries it on under a given name, that some other person should "assume the same name, or the same name with slight alteration, in such a way "as to induce persons to deal with him in the belief that they are dealing with "the person who has given a reputation to the name."

In *Wotherspoon vs. Currie*, Lord WESTBURY said (p. 521)

"I take it to be clear, from the evidence, that, long antecedently to the "operations of the respondent, the word 'Glenfield' had acquired a secondary "signification or meaning in connection with a particular manufacture—in short, "*it had become the trade denomination of the starch made by the appellants. It was "wholly taken out of its ordinary meaning, and in connection with starch had "acquired that peculiar secondary signification to which I have referred. The word "'Glenfield,' therefore, as a denomination of starch, had become the property of the "appellants. It was their right and title in connection with the starch.*

"Now, the question is, has that property been invaded by the respondent? "I take the whole proceedings of the respondent, from the beginning to the end, to "be nothing in the world more than a contrivance for the purpose of getting the "word 'Glenfield' associated with his manufacture. * * * I have no doubt, "therefore, that this case comes within the principle on which the jurisdiction is "founded—*the principle being to prevent a party from fraudulently availing himself "of the trade-mark of another which has already obtained currency and value in the "market, by whatever means he may devise for the purpose, provided the means are devised "in order to give him a colourable title to the use of the word, and provided it be shewn "from the manner in which he has employed those means that his object was from the "beginning to invade the property of the appellants.*" (Italics ours.)

Lord CHELMSFORD supplements this statement of principle as follows (p. 519):

"Where the trade-mark is not actually copied, fraud is a necessary element in "the consideration of every question of this description—that is, the party accused "of piracy must be proved to have done the act complained of with the fraudulent "design of passing off his goods as those of the party entitled to the exclusive "use of the trade-mark. For the purpose of establishing a case of infringement it "is not necessary to shew that there has been the use of a mark in all respects "corresponding with that which another person has acquired an exclusive right to "use, if the resemblance is such as, not only to shew an intention to deceive, but "also such as to be likely to make unwary purchasers suppose that they are purchas-"ing the article sold by the party to whom the right to use the trade-mark be-"longs."

Lord BLACKBURN restates the principle of these cases, in *Johnston vs. Orr Ewing*, as follows (p. 228):

"I think the true guide is given by Lord KINGSDOWN in the *Leather Cloth Com-"pany (Limited) vs. American Leather Cloth Company (Limited)*, where he says: "'The fundamental rule is that one man has no right to put off his goods for sale "'as the goods of a rival trader, and he cannot, therefore, in the language of Lord "'LANGDALE in the case of *Perry vs. Truefitt*,' be allowed to use names, marks, "'letters or other indicia by which he may induce purchasers to believe that the "'goods which he is selling are the manufacture of another person'''

In delivering judgment in *Read vs. Richardson*, Lord Justice BRETT said:

"If the goods of a manufacturer have, from the mark or device used, become

" known in the market by a particular name, the adoption by a rival trader of any " mark which will cause his goods to bear the same name in the market, is a " violation of the rights of his rival."

Lord Justice COTTON says, in the same case :

" It merely comes to this: Is it possible, from the use of this label, that the " defendants' beer may be called or be passed off on unwary or ignorant purchasers " as the '*Dog's Head Beer?*"

So, in *Thompson vs. Montgomery*, Lord Justice LINDLEY states the same principle in these words (p. 50) :

" The plaintiffs' rights are to prevent anybody from passing off his goods as the " goods of the plaintiffs. SIR HORACE DAVEY says that the plaintiffs have no exclu- " sive right to the use of the words 'Stone Ale' alone. *Perhaps not as against the* " *world.* He says that the plaintiffs have not any right to prevent the defendant " selling his goods as having been made at *Stone;* I am not prepared to say that " they have. *But as against a particular defendant who is fraudulently using, or* " *going to fraudulently use the words with the express purpose of passing off his* " *goods as the goods of the plaintiffs, it appears to me that the plaintiffs may have* " *rights which they may not have against other traders.* In regard to that proposi- " tion, it appears to me that the *Glenfield Starch* case has an extremely important " bearing upon this case. *The evidence in this case convinces me that any ale which* " *may be sold by this particular defendant as* 'STONE ALE' *will be intended by him to* " *be passed off as the plaintiffs' ale. I am satisfied that he does not use the words* " 'STONE ALE' *for any honest purpose whatever, but, according to the evidence, with* " *a distinctly fraudulent purpose.*

" Is there any reason, then, why the Court should not deal with him accord- " ingly, and prevent him from carrying out such intention by restraining him from " using the words which he will only use for that purpose? In my opinion the " *Glenfield Starch* case warrants us in going that length as against this particular " defendant " (italics ours).

This decision, and the principle upon which it was decided, has recently been affirmed by the House of Lords. Lord HERSCHELL says, speaking for that body (p. 220) :

" I do not think the principle on which the Court ought to act in such a case " as the present is open to doubt. The respondents are entitled to ask that a rival " manufacturer shall be prevented from selling his ale under such a designation as " to deceive the public into the belief that they are obtaining the ale of the respond- " endents, *and he ought not the less to be restrained from doing so, because the practi-* " *cal effect of such restraint may be much the same as if the persons seeking the injunc-* " *tion had a right of property in a particular name*" (italics ours).

In *Hart vs. Colley*, Judge NORTH found that the complainant's trade-mark was not properly registered, and that, consequently, he had no action with respect to that, but tried the issue whether the

defendant had been passing off his goods as the goods of the complainant, and granted an injunction, finding that he had so done.

The case of *Reddaway vs. Bentham Hemp Spinning Co.*, decided by the Court of Appeals, in July, 1892, contains the latest formulation of the principle underlying this class of cases. The case was this: The complainants were manufacturers of a kind of belting known as "Reddaway's Camel-hair Belting." They did not have a registered trade-mark, but had sold the belting under the above name for more than twelve years, and had acquired what Lord-Justice LINDLAY said could be called a "*common-law trade-mark.*" The principle of the case was not disputed, the only question being as to the sufficiency of the evidence. Mr. Justice CAVE, who tried the case, directed a verdict for the defendants on the ground that there was no evidence showing that they had sold their belting as the complainants' belting, or that any persons had, in fact, been deceived. The Court of Appeals, however, ordered a new trial on the ground that there was a question for the jury. Lord Justice LINDLEY states the ground, as follows (p. 645):

"There ought, in my opinion, to be a new trial, and two questions, at least, "should be left to the jury, viz.:

"1. What does camel-hair belting mean? Does it mean belting made by the "plaintiffs as distinguished from belting made by other manufacturers, or does it "mean belting of a particular kind without reference to any particular "maker?

"2. If it has the first of these meanings, then the next question will be, Do "the defendants so describe their belting as to be likely to mislead purchasers, "and to lead them to buy the defendants' belting as and for the belting of the "plaintiffs?

"The second question, if answered in the affirmative, would entitle the plaintiffs to an injunction without proof of an intent to deceive."

Lord Justice LOPES then states the principle of the cases of "unfair trading" as that principle stands developed in England to-day, as follows:

"If a person sells his goods *with the intention of deceiving purchasers* and of "inducing them to believe that his goods are the goods of another, this is actionable, and entitles the latter to recover nominal damages, even though no specia "damage is proved. If an article has acquired a distinctive meaning in the trade

" connecting it with a particular person's manufacture, and another so advertises or " describes or makes up his goods as to lead purchasers to believe, or to create a " probability of their believing, that they are buying the goods of the former, when " in fact they are buying the goods of the latter (and this though there is no inten- " tion to deceive and no special damage proved), a court of equity will grant relief " by way of injunction.

" The fraudulent intention is essential in the first case ; it is unnecessary in the " second. * * * To obtain this relief [by injunction] it was not necessary " to prove any fradulent intention ; it was sufficient for the plaintiffs to prove that " the term ' camel-hair belting ' denoted a kind of belting well known in the trade " with reference to his particular manufacture, and that the defendants had so " advertised and described their belting as to lead purchasers to believe, or to make " it probable they would believe, that the defendants' belting was the plaintiffs' " (Italics ours).

The same principle has been applied, although by no means so uniformly, by the courts of this country.

One of the earliest cases is that of *Kinney vs. Basch*, 16 Amer Law Reg. (N. S.), 596, decided by the Supreme Court of New York, in the year 1877. The Court sustained the complainant's right to the symbol " ½ " as the distinctive mark of his cigarettes, although it was to an extent descriptive of the cigarettes as made from two tobaccos mixed in equal proportions. We quote from the opinion :

" The later cases have proceeded upon different and more equitable principles, " in defining the grounds upon which courts of equity interfere in cases of this " description.

" This interference, instead of being founded upon the theory of protection to " the owners of trade-marks, is now supported mainly to prevent fraud upon the " public. *If the use of any words, numerals or symbols is adopted for the purpose " of defrauding the public*, the courts will interfere to protect the public from such " fraudulent intent, even though the person asking the intervention of the court " may not have the exclusive right to the use of those words, numerals or symbols. " This doctrine is fully supported by the latest English cases of Lee vs. Haley, L. " R., 5 Ch., App. Cases, 155 ; Wotherspoon vs. Currie, L. R., 5 House of Lords' " English and Irish Appeals, 58, and, also, in the case of Newman vs. Alvord, 51 " N. Y., 180.

" It is urged that the defendant's labels are no imitation of the plaintiff's. I " am led irresistibly to the conclusion that the adoption of the label by the defend, " ants was solely because they thought the public might be deceived ; and the " differences were made in the hope that they might avoid possibly the damages " arising from the use of a perfect imitation."

Annexed to this opinion, as reported in " The American Law Journal," is an able note of Rowland Cox, Esq., written at the same time, in which he states that the view announced in the above

opinion, although advanced, might safely be regarded as settled law, the tendency of courts of equity being to advance the principles quite as far as it had been carried in that case. His conclusions expressed in this note have been amply verified by the later cases, and the note itself has been cited with approval by the courts.

After a period of twelve years this case was approved by the same Court in the case of *Kinney Tobacco Co. vs. Waller*, 53 Hun, 340.

Another leading case, and one which may, perhaps, be said to have given force and weight to the modern practice, is that of *Avery & Sons vs. Meilke & Co.*, 27 O. G., 1027. In that case suit was brought to restrain the infringement of a trade-mark and "to "prevent a fraudulent usurpation of trade reputation." The complainants were well-known manufacturers of plows, which they marked with their own name and with a Maltese cross, and with certain letters and figures, indicating size and series, branded and cast on the plows. The defendants (and appellees), who had previously manufactured other styles of plows, imitated closely the complainant's structure, arrangement of lettering, series of numbering, coloring, and general make-up, though they *used their own name*, and *did not use any mark specifically claimed by plaintiffs as a trade-mark*.

After an elaborate review of all prior authorities, the Court used the following words :

"What is lacking in authority to reach every case of infringement may be "easily supplied from the never-failing fountain of justice, to which principle finds "universal application. What are the facts of this case? The appellees have not "used a single letter, figure or word that belongs to the appellant's trade-mark "proper, yet by the exact simulation of the plow in every perceivable point exposed "to an ordinary observer and purchaser, and the use of the same coloring and "staining, the same relative position of letters and figures as employed and used "by the appellants, avoiding a literal appropriation of any part of their trade-"marks, the appellees have obscured their own and appellants' trade-mark, but at "the same time sought to avoid detection and responsibility in doing so, and caused "their plows to be taken for and purchased as those of appellant's. Thus, by skill-"ful combination of legal particles, taken one at a time, and in the aggregate, "leaving the mere trade-mark untouched, they have so confused its force and effect

" as to destroy its office and real efficiency to distinguish the appellant's plow from " all others." * * *

" Courts of law and equity have finally become possessed of jurisdiction ample " to protect a trade-mark which may be used by all to distinguish their goods from " others; to prevent the sales of the goods of one as being those of another, by " means of fraud and misrepresentation in the use of marks, signs, words, numerals " or symbols; to afford redress for such sales of goods which are a misleading " imitation of those of another for whose manufacture they may be sold, where " the intentional false representations or fraud from which damage the sales are " made, by the use of a trade-mark or direct or indirect, is presumed and its ex- " tent may be proven. In all cases, however, the conduct or adopted means of the " imitator, must be such as does or would probably deceive the ordinary mass of " purchasers. In conclusion, we repeat that this law grows out of the common " principle of justice that the rights of each should be so used as not unnecessarily to " injure those of others whose skill has made their goods valuable in their reputa- " tion, that finally compensate them for their enterprise, industry and fidelity. We " are, therefore, of the opinion that the relief prayed for should have been " granted."

So in *Frese & Co. vs. Bachof*, 14 Blatch., 432. Suit was brought to restrain the use of a form of package, and of colors on the wrappers, and of labels simulating those used by the complainants in putting up a compound made by him and called " Hamburg Tea." It appeared that *the defendant used his own name on his labels*, though he *copied the form and style of package* of the complainants.

After stating that the manufacture and sale of the compound was open to all persons, as the complainants had no patent, and that the bill did not directly allege, nor did it appear, that the case proceeded on the ground that the name " Hamburg Tea " had been appropriated and used by it to identify its productions, the Court said:

" The exact question is, whether this is a simulation of his wares for those of " the orator's firm, calculated to have them pass for the orator's firm's wares. Prob- " ably, no mere form of a package would ever alone amount to a representation " capable of deceiving that the wares contained in it, were those of any particular " make. But when the form of these packages, the color of the wrappers and " papers done up with them, and the form and color of the labels are considered all " together, it is quite apparent that, *when they had been so long used by the orator's " firm for holding this particular compound, when offered for sale, the mere appear- " of the packages would amount to a representation that they contained that article of " manufacture.*

" It is equally obvious that the very slight changes made by the defendant in " the general appearance of his packages used by him now, would not put the gen- " eral public purchasing such articles on their guard, and that the use of such pack-

" ages for a similar article would amount to a forcible representation that it was the " same article that the orator's firm had been accustomed to pack in that " way." (Italics ours.)

In the same line is *Sawyer vs. Horn*, 1 Fed. Rep., 24, decided by the Circuit Court for the District of Maryland. Suit was there brought, not to prevent the simulation of any specific mark, but to enjoin the defendant from putting up his goods in the manner in which he had done, or in any other manner so simulating the form, color, labels *and appearance* given by the complainant to his goods as to mislead purchasers into mistaking one for the other. The case is important, because the nature of the action is identical with that of these present complainants. It is important, also, as deciding a point of defense nearly identical with one made by the defendants in the present case. We shall refer to this in a later portion of our brief. Judge MORRIS states the facts of the case and reviews the authorities, and then concludes his judgment as follows (p. 38):

" *What we decide is that whether the complainant has a trade-mark or not, as he* " *was the first to put up bluing for sale in the peculiarly shaped and labeled boxes* " *adopted by him, and as his goods have become known to purchasers, and are bought as* " *the goods of the complainant by reason of their peculiar shape, color and label, no* " *person has the right to use the complainant's form of package, color or label, or any* " *imitation thereof, in such manner as to mislead purchasers into buying his goods* " *for those of the complainant, whether they be better or worse in quality.* " *And finding from the exhibits and proof in the cause, that the bluing put up by the* " *respondent is not only well calculated so to mislead purchasers, but has actually* " *done so, to the injury of the complainant, we are of opinion that the respondent* " *should be perpetually enjoined, and that he should account to the complainant for the* " *damages sustained by him.*"

To the same effect is *Carbolic Soap Co. vs. Thompson*, 25 Fed. Rep., 625, where it was held that parties would be protected from an imitation of the packages in which they put up their goods, so far as the packages were peculiarly designed and shaped for the purpose of distinguishing their goods, and from an imitation of them in color, design, style and lettering, combined with the labels used to mark such packages.

So in *Appollinaris Co. vs. Scherer*, 27 Fed. Rep., 22., it is said:

" The interposition of a court of equity is frequently invoked, and always suc-
" cessfully, to restrain *unlawful competition in trade*. All practices between rivals

" in business, which tend to engender unfair competition, are odious, and will be " suppressd by injunction." (Italics ours.)

And so in *Moxie Nerve Food Co. vs. Several Defendants*, 43 O. G., 88, this Court enjoined the use of words which were merely descriptive, on the ground that they were used as a means of effecting a fraud, citing with approval the case of *Kinney vs. Basch, supra*, and the note of Mr. Cox.

See also

Browne on Trade-marks (2d ed.), Chap. XII.
Upton vs. Ansonia Brass and Copper Co.
Boardman vs. Meriden Britannia Co., 35 Conn., 402.
Koehler vs. Saunders, 122 N. Y., 65.
Hostetter vs. Adams, 10 Fed. Rep., 838.
Shaw Stocking Co. vs. Mack, 12 *Id.*, 757.
Anheuser-Busch Brewing Co. vs. Piza, 24 *Id.*, 149.
Southern White Lead Co. vs. Carey, 25 *Id.*, 125.
Moxie Nerve Food Co. vs. Baumbach, 32 *Id.*, 205.
Sawyer Crystal Blue Co. vs. Hubbard, *Id.*, 388.
Putnam Nail Co. vs. Bennett, 43 *Id.*, 800.
Merriam vs. Famous Shoe & Clothing Co., 47 *Id.*, 411.
Cal. Fig Sirup Co. vs. Improved Fig Sirup Co., 51 *Id.*, 296.
City of Carlsbad vs. Tibbetts. *Id.*, 852.
Improved Fig. Syrug Co. vs. Cal. Fig. Syrup Co. (C. C. of App.), 54 *Id.*, 175.

No case has as yet been presented to this Court necessarily calling for an application of the principles laid down in the above line of cases. And yet, the doctrine of these cases of " unfair trading " has been recognized in a number of cases, and has been expressly stated in two very recent decisions.

In *McLean vs. Fleming*, 96 U. S., 245, it was held that the complainant had a valid trade-mark, but the Court explicitly states that there was another ground on which their judgment could be rested, and that the complainant was entitled to protection wholly apart from his technical trade-mark.

Mr. Justice CLIFFORD, speaking for the unanimous Court, said:

"Nor is it necessary, in order to give a right to an injunction, that a specific "trade-mark should be infringed; but it is sufficient that the Court is satisfied that "there was an intent on the part of the respondent to palm off his goods as the "goods of the complainant, and that he persists in so doing after being requested "to desist. * * * Chancery protects trade-marks upon the ground that a party "shall not be permitted to sell his own goods as the goods of another; and, there- "fore, he will not be allowed to use the names, marks, letters *or other indicia* of "another, by which he may palm off his own goods to purchasers as the manufact- "ure of another" (italics ours).

In *Lawrence Mfg. Co. vs. Tennessee*, 138 U. S., 537, the Court, after holding that the complainant had no trade-mark, strictly speaking, and consequently was not entitled to relief under that head, reviewed the law relating to the whole subject of unfair trading, citing with approval the cases of *Putnam Nail Co. vs. Bennett*, *Wotherspoon vs. Currie* and *Thompson vs. Montgomery*, *supra*. But the Court held that in that case there had been no fraudulent intent on the part of the defendant, and that the public had not been deceived. They say (p. 549):

"It seems, however, to be contended that plaintiff was entitled at least to an "injunction, upon the principles applicable to cases analogous to trade-marks, that "is to say, on the ground of fraud on the public and on the plaintiff, perpetrated "by defendant by intentionally and fraudulently selling its goods as those of the "plaintiff. Undoubtedly, an unfair and fraudulent competition against the busi- "ness of the plaintiff—conduct with the intent on the part of the defendant to "avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's— "would, in a proper case, constitute ground for relief."

And again in *Brown Chemical Co. vs. Meyer*, 139 U. S., 540, Mr. Justice BROWN, speaking for the Court, said (p. 544):

"The theory of a trade-mark proper then being untenable, this case resolves "itself into the question whether the defendants have, by means of simulating the "name of plaintiff's preparation, putting up their own medicine in bottles or pack- "ages bearing a close resemblance to those of plaintiff, or by the use of mis- "leading labels or colors, endeavored to palm off their goods as those of the plaintiff. "The law upon this subject is considered in the recent case of *Lawrence Mfg.* "*Co. vs. Tennessee Mfg. Co.* * * * In this case, the usual *indicia* of fraud are "lacking. * * * While the resemblances in this case are perhaps too great to "be considered the result of mere accident, the dissimilarities are such as to show "an intention to avoid the charge of piracy. The similarities in the advertising "cards or posters are undoubtedly much greater, both being a deep yellow in "color, with an arrangement and shape of letters closely approaching identity, and, "*if this resemblance had been carried into the labels, we should have regarded it as* "*strong evidence of a fraudulent intent; but as it appears from the testimony that*

" the use of these posters has been discontinued, and, further, *that the defendants* " *in this case never employed them or put them up, or authorized others to do so, it is* " *clear that as against these defendants the Court cannot now be properly called upon* " *to enjoin them.*"

In the case which we now present to the Court, the missing elements—the *indicia* of fraud which were lacking in *Lawrence Mfg. Co. vs. Tennessee* and *Brown Chemical Co. vs. Meyer*—are, we believe, supplied. It is abundantly proved that the simulation of the marks, labels and general appearance of the Coats, thread by these defendants has been intentional and very carefully planned, and that they have in consequence been enabled thereby to palm off their thread on the public.

We submit that we have made out a case of " unfair trading " which calls for the application of the doctrine of the above cases to its fullest extent.

IV.

The facts out of which arises the Plaintiffs claim to Protection.

First. *History and standing of the plaintiffs in the trade*:

The complainant were, in 1883, the date when the present suit was begnn, the members of the firm of J. & P. Coats (p. 31, Auchincloss, Q. 5), which, for more than three generations, has been engaged in the manufacture of spool cotton at Paisley, Scotland (p. 31, Auchincloss, Q. 6).

Their thread was first put upon the market in this country about the year 1840 (p. 31, Auchincloss, Qs. 4, 11). And for more than twenty-five years last past, they have been manufacturing thread in

this country (by aid of the Conant Thread Company, which they control), with factories at Pawtucket, R. I. (p. 31, Auchincloss, Q. 67; p. 61, H. B. Auchincloss, Q. 67; p. 7, Hopkins, Q. 223).

Six-cord spool cotton is the great family thread (p. 299, Hopkins, Q. 40). It is this six-cord thread put up on spools in 200-yard lengths and in numbers from 8 to 100, that is known to and purchased by the great mass of consumers; and it is as manufacturers of this same six-cord thread that the complainants are known throughout the world to-day.

Six-cord thread was not made in this country until the year 1865, a kind of thread known as glacé and composed of three cords being the only thing made prior to that date. And yet the country was abundantly supplied with six-cord thread which had been manufactured in Great Britain, chiefly by Messrs. J. & P. Coats, at Paisley, Scotland, who, as we have said, began their importations about the year 1840. Mr. Hopkins, the president of the defendant company, in his testimony, only names two other firms of importers prior to 1865, viz.: J. J. Clark & Co. and Orrs & McNaught (p. 297, Qs. 16, 19).

It was about the year 1865, or soon after, that the Conant Thread Company was organized and the complainants began their manufacture of six-cord thread at Pawtucket, Rhode Island. At about the same time, the manufacture of this thread was also begun by the Willimantic Linen Company, George A. Clark & Company and the defendant, the Merrick Thread Company (p. 297, Hopkins, Qs. 16, 19, 273; x-Qs. 360, 671, 674).

The Messrs. Coats at once took the lead in this line of manufacture (p. 371, Hopkins, x-Q 644). Other manufacturers joined in the business at later dates, but, after a period of twelve years, or in 1877, J. & P. Coats were the acknowledged head of the spool-cotton industry in this country, just as they had been abroad for a great many years (p. 62, H. B. Anchincloss, Q. 8.) The magnitude of their business in this country alone, and their position of leaders in the trade, is admitted by President Hopkins,

of the Merrick Company, who is the last man who would exaggerate on this point. He says (pp. 367, 368):

"614 x-Q. Won't you please state the number of spindles in the aggregate "that you think were being run in this country in 1877, for the manufacture of "200-yard six-cord thread? A. You mean the number of spinning spindles to spin "the single yarn? I will give you my approximate estimate.

"615 x-Q. I don't know how you are accustomed to consider the work done by "the spindles. What I want from you is your opinion, if you have any, upon the "number of spindles in use at the time, for the purpose of getting at the total pro- "duction in the country at that time. Please state it in your own way. A. I "should say from 175 to 200 thousand spinning spindles were running in this "country for the production of six-cord thread at that date. That is my best "judgment on that question.

"616 x-Q. Please state how you apportion those between the different manu- "facturers that you name that were running at that time. A. I calculate that the "Willimantic were running at that time for six-cord thread about *thirty* thousand "spindles; the Merrick Thread Company about *fifteen* thousand; the Conant "Thread Company about *one hundred and thirty* thousand spindles."

In 1886, the year when Mr. Hopkins is testifying, he estimates the total annual *production* of 200-yard six-cord thread produced by the Messrs. Coats in this country at 126,000,000 spools (and he will not undertake to say that this is within 25 or 30 million of the correct amount, p. 363, x-Q. 566), while he estimates the *total* amount of *sales*, which, of course, must include sales of imported thread, at only about 300,000,000 spools (p. 362, x-Q. 565, 571).

In other words, by the testimony of the defendants themselves, Messrs. Coats were running one hundred and thirty thousand of this one hundred and seventy-five or two hundred thousand spindles in operation in 1877, and, nine years later, were manufacturing nearly or quite one-half of the total production of six-cord spool cotton made in this country.

It is scarcely necessary to refer to any further testimony as to the position in the trade occupied by the complainants, and we will refer only to that of two other witnesses, the general selling agents of Messrs. Coats' largest rivals in trade.

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* He then goes on to say that the George Clark Company had about one hundred thousand spindles, and that that made "about 175 thousand spindles," but in assigning a number of spindles to that company, in order to make up his total, he evidently made a mistake in his arithmetic.

Theodore M. Ives, agent for the Willimantic Linen Company, testifies (p. 108):

"15 Q. Please state what the reputation of the J. & P. Coats thread is, and to "what extent it is known in the retail trade, especially as a family thread? "A. I should say that J. & P. Coats' threads have the reputation of being the "leading brand in the market, and in the retail trade it probably stands unequaled "in reputation as an article of sale."

So *Thomas Russel*, selling agent of Clark's Mile End Spool Cotton, says (p. 120):

"15 Q. Please state what the reputation of the J. & P. Coats thread is in the "market. A. I think it stands at the head of all the threads in regard to reputa- "tion."

To the same effect is the testimony of Cox, traveling salesman for Clark's Mile End Spool Cotton (p. 190, Q. 4); Root, salesman for the Willimantic Company (p. 204, Q. 4); Frost (p. 174); Dallon (p. 170); Brightson (p. 158); defendants' witness Knox (p. 456, x-Qs. 238–239); and many other witnesses.

So much for the position and reputation of the complainants at the time of the acts complained of. They were the acknowledged leaders of the trade. This fact should be borne in mind in the further consideration of this case.

Second. *Adoption and peculiarity of labels and embossing of the Coats' Spools.*

(1) The first dozen spools of Coats' thread imported and sold in this country, in 1840, bore a small black and gold label

on one end (p. 31, Auchincloss, Q. 11), and this same label has been used by Messrs. Coats from that day to this, without change, on all 200-yard six-cord spool cotton made by them (p. 31, Auchincloss, Qs. 12, 13, 25; p. 63, H. B. Auchincloss, Q. 16).

Three things should be noted here:

(1) That this label is *much smaller* than the head of the spool, the centre of which it occupies, thus leaving a broad peripheral border of the wooden spool head uncovered.

(2) The *centre* is *black*, with the numeral in its lower portion.

(3) There is a *light gold* outer border *bearing the name.*

An important addition and change in the appearance of the spool head for this style of thread was made in this peripheral border some time during the years 1870 to 1873.

This change was as follows: In the year 1870, H. Conant, the treasurer of the Conant Thread Company, obtained a patent for a design for embossing the ends of sewing thread spools, which he subsequently assigned to the complainants (p. 85, H. B. Auchincloss, x-Qs. 129, 131; p. 730). This patent is design patent No. 3749, and is dated April 5, 1870. It is printed on page 24 of the record.

"The description that near the outer edge of the head of the spool is embossed "in the wood an endless chain of loops *a a*, formed apparently by arranging two "threads to cross each other at regular intervals. In the eye of the loop the "number of the thread is *stamped.*"

The claim and drawing are as follows:

"The design for ornamenting the ends of sewing-thread spools, which consists "in *a chain of loops a a*, within which loops *is a number* expressive of the number "of the thread wound on the spool, substantially as shown and described."

It will be observed that this patent *does not* claim the use of *embossed* numerals, nor does the specification describe any style but *stamped* numerals.

The claim does not mention embossing at all.

It is for the *design* consisting of the "*chain of loops*" *enclosing the numerals.*

Shortly after the issue of this patent, and before the date of the assignment, some time during the years 1870 to 1873 the complainants, by an arrangement with Mr. Conant, began to *emboss* this design, or one substantially the same, *on the natural-colored wood border* of their spools, and to use it with the small paper label having the black centre and light gold border, so that, *together*, the label and the embossed design covered the whole end of the spool (p. 32, Auchincloss, Q. 17; p. 44, Belfield, x-Qs. 21 25.)

From the day of the first adoption of this design, a series of embossed numerals, with or without the loop, has been used in combination with the black and gold label on every spool of 200-yard six-cord thread made by the complainants (p. 27, Beale, Qs. 9–10; p. 32, Auchincloss, Qs. 15–18; p. 63, H. B. Auchincloss, Q. 16).

It should also be stated that this *combination* of embossed numerals and peculiar label has been used only on one end, the head, of the spool, and only on spools containing 200-yard lengths of the six-cord thread; and that it is the simulation of the label and embossing on this end of the spool, alone, which is made the basis of this action.

An entirely different label is used on the other end of the spool, and that end has never been embossed.

It will be observed now that the *prominent* and *distinctive* features which, when *combined*, characterized the spool heads of the complainants (aside from the name) were:

(1) A *black centred* label, bearing the numeral.

(2) A *light gold outer band* on the label, bearing the name.

(3) A peripheral border of the *natural color* of wood, having

(4) *Embossed* or raised *numerals* on such periphery.

Where *appearances* are important, the eye and mind are governed by the striking features of the appearance, as produced *by the combination* of the different elements which go to make it up.

Details or differences of detail in the individual parts of a design composed of several parts are apt to be overlooked. It is *the sum of the effects of all the parts*, or the *combined effect* of the parts, rather than the effect of any one separate part, which decides the question of similarity or dissimilarity.

Third. *The specific trade-marks of the plaintiffs:*

(1) *The trade-mark of 1875.*

In the year 1875, Messrs. Coats registered in the United States Patent Office, as their trade-mark, the distinctive appearance of their spool head obtained by the use of the above-described embossed characters, in combination with their label. This trade-mark is set forth, together with several others, showing the importance attached by Messrs. Coats to the combination of label and design as the distinguishing characteristics of a spool of their thread, in the sixth clause of the bill of complaint (p. 4).

The certificate registration and we desire to call particular attention to the language used is as follows (p. 25):

" One of our distinctive marks is found upon the ends of the wooden spools " on which sewing thread is wound. It consists of a central label of paper formed " of concentric circles of black on a light ground, containing on one of the *light* " *bands* the words 'J. & P. Coats', 'Best Six-Cord,' and on the *central black circle* " the figures and letters '200 yds.,' and a numeral, which in the *fac simile* which ac- " companies this specification is the figure 8, but the numeral may be varied. On " the end of the spool, surrounding the label, is a *peripheral band* of the natural " wood embossed with an ornamental design *of crossed lines and central stars*, with " intermeidate spaces, in which are *embossed numerals* corresponding to that on " the centre of the label. Other forms of ornamentation may be substituted for " that shown in the peripheral band without altering the character of our trade- " mark, the essential features of which are the label of concentric rings, having in " the central spot a numeral, and embossed peripheral border of the natural wood, " including among its ornamental designs the same numeral as that displayed in the " centre.

" The trade-mark has been used by us in our business for about a year last " past. The particular goods upon which we have used it is spool cotton, and the " trade-mark covers entirely the end of the spool." (Italics ours).

It will be seen that this trade-mark does not *require* the use of the patented design. The " chain of loops " is *not* an essential element of the trade mark, but it consists, essentially, of the central label with the name of J. & P. Coats on the *light band*, and with the *dark centre* in which is the number of the thread contained on the spool, and *surrounding* this label, and *in combination* with it, the *embossed peripheral border* of the *natural colored wood* of the spool, of which the principal feature is the *embossed numerals* arranged around the border.

It is to be noted, also, that the selected pattern, the *preferred*

pattern illustrated in the trade-mark has *stars between the raised numerals.*

Can it be questioned that this combination of elements was a legitimate subject of trade-mark property. No objection has been raised against it on the ground that such a device is not on its face a valid trade-mark. Its characteristic distinctiveness is apparent, its artifical character is evident. Messrs. I. & P. Coats were the first to adopt it. There is no pretense that it was ever before used in connection with the manufacture of thread or any other article (p. 403, Hopkins, x-Qs. 956, 957).

We submit, therefore, as a proposition of law, that it was a proper trade designation of the origin of the goods to which it was applied, and entitled to registration as a technical trade-mark.

The defense insisted upon is that this *combination* of devices was not capable of being made a valid trade-mark, *because one element* of which it is composed was covered and protected by the Conant design patent. It is argued that to allow this is to give the complainants, under the name of a trade-mark, an indefinite extension of the monopoly created by the patent, and a large number of cases are cited against this proposition.

Undoubtedly, a patent property cannot be continued in life, after the expiration of the patent, under the guise of a trade-mark. The complainants make no such contention, and assert no such claim. They claim that their trade-mark does not continue the monopoly of the patented design.

The Conant *Patent* protected the design consisting of the *numerals* AND *the chain of loops* on the ends of sewing-thread spools.

So far as Mr. Conant and his patent was concerned it taught nothing as to embossing the numerals, nor as to using such numerals on uncolored wood, nor as to combining it with any paper label. Indeed, it contemplated the abolition of paper labels.

The patent *never controlled,* nor did it purport to control, the mere use of *embossed numerals.* It claimed only *a chain of loops enclosing numerals.*

The Coats' *trade-mark*, on the other hand, was originated and adopted afterwards by Messrs. Coats', and they assert that its distinguishing characteristics are imitated *only when numerals are embossed on the natural colored wood of a spool head and used in combination with a central label having the described black centre and gold band.*

In other words, the trade-mark does not continue the monopoly of the patented design, but adopts *one* feature not claimed in such design, the numeral, NOT in combination with the other part, the *chain of loops*, BUT in combination with the peculiar and distinctive label, which had long previously been the recognized badge of the complainant's goods.

On the expiration of the patent, the monopoly ended in the design of the *combination* of the *numerals* and *chain of loops in themselves.* Any one was then free to make use of the design *by itself.* He could use it upon a black, or a red, or a blue spool-head; he could emboss it if he choose, in any color, upon the end of the spool opposite the end on which he used a black and gold label, or he could emboss it upon a spool head of natural colored wood in combination with a red, or white or blue label.

But if the complainants had, *in addition* thereto, acquired, by use and registration a right of property in the distinctive appearance of those goods created by *the combination of the label* with the *border of natural colored wood* and the *embossed figures*, no one could intentionally imitate such spool-heads by using embossed numerals in combination with a black and gold label similar to the complainants', because they had appropriated this *dress* to represent the origin of their goods.

The fact that the Conant Patent expired after the adoption and registration of the trade-mark, of which *one feature* formed a part, creates some apparent confusion of rights; but does this make any real difference?

Suppose the Conant Patent had expired in 1850, and that in 1875 the complainants or any other party, conceiving the idea of combining it with their old label to mark their goods, had then

registered the combination, could any one question the validity of this trade-mark? Or suppose the design patented by Conant had never been patented at all, but had always been free to the public to be used by itself. Still it would be entirely proper to select *it* or *a part of it and to associate it with other features* to give a distinctive appearance.

That would be no more nor less than the ordinary case. The majority of trade-marks consist of some arbitrary appearance or symbol (which may in itself be new or old) applied to a particular line of goods. Any one has a right to apply the same word to a distinctly different article, and can make any use of the word, except that *particular* use to which the registered owner has appropriated it. So a word which, by itself, cannot be appropriated to the exclusive use of an individual because others are equally entitled to its use, may be combined with other elements, and the whole legally registered as a trade-mark.

It surely can be no objection that the complainants registered their trade-mark during the life of the patent. As a matter of fact they enjoyed the exclusive use of this trade-mark for *two years after* the expiration of the Conant design *before* the defendants began to make use of the combination of embossed numerals and peculiar label and natural color of the wood.

To borrow an illustration from the law of patents for combinations of machinery: a patent is granted for a combination of A, B and C; this patent expires; it is common property, but before it has expired another party, or the same party, makes a combination of A, B, C and D. This new combination is patentable, either before or after the expiration of the old patent, and the expiration of the patent for the old combination does not invalidate the patent for the new, nor does it authorize the public to make use of the new combination.

So, here, the complainants' trade-mark is for a combination of elements. These elements, separately, may be said to be old, but

in the relation in which they are brought together they form a distinctive device, and, when registered, a valid trade-mark.

Hosteter vs. Adams, 10 Fed. Rep., 838, 842, and cases cited.

Frost vs. Rindskopf, 42 *Id.*, 408.

Much stress was laid in the argument of the defendants, on the hearing below, upon the case of *Lorillard vs. Pride*, 28 Fed. Rep., 434. The decision in that case was undoubtedly correct, but to appreciate it and its want of applicability to any question here, the case must be understood as to its facts. Now, that suit was an attempt to enforce broadly a claim to the use of tin as a metal, without any regard to its shape or the form in which it was put, as a trade-mark. It was made clear to the Court that the Lorillards had never made claim to that subject, as a trade-mark, until they asserted it in the controversy before Judge BLODGETT. It appeared that originally they made use of tin under the authority of the Seidler Patent, which claimed the application to a plug of tobacco of a piece of tin bearing the name of the manufacturer and impressed into the filler of the plug underneath the outside wrapper of leaf, and the idea of the patent was, that this external wrapper would tend to keep the tag in place, and the letters upon the tag, being raised, could be seen through the ultimate wrapper. Other parties commenced to apply tin tags to a plug of tobacco, by sticking them into the outside of the plug, upon the outside wrapper, and thereby not using the mechanical device which was the subject of the Seidler Patent. Thereupon, a series of reissues was taken to endeavor to claim broadly tin applied to a plug of tobacco, whether under the wrapper or on the outside. Suits upon these reissues failed after the law of reissue had been reconsidered by this Court. Meanwhile, and while these suits were in progress, the Lorillards themselves had manufactured for other parties great quantities of tobacco, and had applied the special tin tags belonging to such parties' manufacture on the plugs, and had furnished the tobacco, when made, to such parties to be sold by them as the special manufacture of such parties. In other words, during

all the time that they were trying to uphold the Seidler Patent, they pretended to no claim to a trade-mark for the use of tin, and gave the best evidence of that want of claim by abandoning any exclusive right to it, by manufacturing for other people tobacco with such dealers' private symbols in tin affixed thereto. After the failure of these suits under the patent, then it was that the experiment was tried of claiming a trade-mark in tin, and necessarily this claim failed.

We submit that the defendants' objection to the validity of the complainants' trade-mark of 1875 is unfounded.

Fourth: *The right as against the defendants independent of any technical trade-mark.*

We do not, however, rest our case upon the technicality of any registered trade-mark. Our claim is something larger. It embraces a claim to a trade *dress* or style of putting up our goods which has designated and distinguished the J. &. P. Coats' thread for a long period of time, and which, whether a technical trade-mark *or not*, cannot be intentionally imitated for the purpose of divesting the trade of the Messrs. Coats.

Nearly *one billion* spools having this *dress* were sold prior to July, 1879, when the defendants bought their knarls and began to emboss their spool heads in imitation of the Coats' spools, and we get this number from the admissions of President Hopkins himself, already referred to (p. 362, x-Qs. 565, 566, and *supra*, p. 22).

(1) *The Coats, six cord family spools (200 yd.) had a* DISTINCTIVE DRESS *and* APPEARANCE, *and the defendants* KNEW IT *before they commenced the acts complained of.*

President Hopkins, of the Merrick Company, testifies as follows (pp. 402, 403):

"947 x-Q. You knew that Messrs. J. & P. Coats were using the embossed "figures on their spool head before you adopted them, did you not? A. Yes, sir.

"948 x-Q. You knew that they had used such embossed figures for a number "of years, did you not? A. I never had seen them many years before. My recol- "lection is that my attention—noticed them about two years, probably, before that, "the first I recollect; it might be three.

" 956 x-Q. Then Messrs. J. & P. Coats were the only spool-cotton makers who, " to your knowledge, had put up their thread on spools having a pattern of em- " bossed numerals around the periphery ? A. Yes, sir.

" 957 x-Q. Has anybody but your company imitated that practice to the present " time ? A. Not that I know of, and I don't think we have, as I understand it."

To this is added the testimony of numerous witnesses. H. B. Auchincloss, Messrs. Coats' general agent in this country, says (p. 63, Q. 16) :

" A. The six-cord threads have been know and recognized by the trade in the " United States by labels, designs, &c., as shown on Schedule C. The tickets have " been in use for forty-two years. The complainants have enjoyed the use of the " trade-marks embossed on the spools since their introduction, subsequent to 1870, " except so far as interfered with by the defendant."

See Schedule C, annexed to Bill of Complaint and offered as an exhibit.

So *Ives*, agent of the Willimantic Linen Company, testifies (p. 108) :

" 17 Q. Please state whether said Coats' thread has become popular and gener- " ally known by any distinctive marks or appearances, and, if so, what ?

" A. The general appearance of the head, or top of the spool, being character- " ized by *embossed figures* on the periphery, *together with black and gold label*, " would, in my opinion, make distinctive marks by which Coats' thread is known."

So *Russell*, agent of the Clark Mile End Spool Cotton Company (p. 120) :

" 16 Q. Please state whether the Coats thread has become popularly and generally " known, as put upon its spools, by any distinct marks and appearances ; and, if so, " what ? A. *By its labels and* the *distinctive embossing of the numbers* on the " spools."

So *Hazlewood* (p. 47) :

" 14 Q. What do you understand to be the distinguishing characteristics of these " spool-heads of the complainant by which they have become known to your cus- " tomers ? A. The *embossed numerals on the outer rim* of the spool-head *and* " the *black and gold label* are the principal distinguishing characteristics."

So *Sears* (p. 99) :

" 51 x-Q. Do you observe the number of this thread on the wood of both the " Coats and the Merrick spool ? If so, please state what you understand is the " object of that ? A. I notice the numbers, and have always supposed it to be a " sort of trade-mark on the Coats' spool, not knowing any other spool cotton to be

"numbered in that way previous to the introduction of Merrick's, or any other "since."

And to the same effect is the testimony of numerous other witnesses—salesmen, retail dealers and purchasers—who have testified that they have been deceived by the likeness of the Merrick spools to the Coats, in respect to the embossed numerals and black and gold label, by which they knew and recognized the Coats goods. We shall refer to this testimony in a later portion of the brief.

The spools of all other manufacturers of spool cotton have their own peculiar marks and characteristics, which distinguish their thread alike from the Coats thread and that of each other.

See copy of "Complainants' Exhibit Comparative Samples," and Farrington's testimony, p. 126.

George A. Clark & Company (O.N.T., 1) has a *large* gold and black label, covering nearly the *whole* end of the spool. The outer band is *broad* and *black*, and has the firm name in gilt.

Kerr & Company for a long time put up their thread on peculiar short spools with projections on their base, and *blue*, *white* and *red* labels; but about the year 1885 (p. 127, Farrington, Q. 11) made a change to an ordinary-shaped spool, but used a very distinctive label, covering the whole end of the spool and having a large dollar mark ($) in gold on a black background and a broad, black border.

John Clark, Jr., & Company (Mile End) has a *silver* and black label with a gold centre, on *black spools* for all white thread and on white spools for black thread.

The Willimantic Linen Company has a *large* label with gold letters in black background, and all white thread is put up on *black* spools.

Brooks has two styles of spools, one with *blue, white and gold* label, on white spools with rounded edges; the other with *red, white gold* and *blue* on *black spools*, also with rounded edges.

(2) The fact that the Coats' thread on the 200 yd. spools was,

in 1879, when unfair trading began, known by its distinctive dress, is not altered by the proof in regard to the use merely of similar LABELS *by others.*

The only spool that had any close resemblance to the Coats spool was that of Orrs & McNaught. This was an English thread which was first put upon the market in this country in 1854, or some *fourteen years after* Coats' thread was first introduced (p. 421, Knox, Q. 3); and it is open to suggestion that it, like that of the defendants, was dressed up in imitation of Coats'. The original instructions indicate a special purpose to compete with Coats (p. 424, Knox, Q. 30), and the specimens of spools produced show, as to some of them, a close imitation of Coats' labels, on *both ends* (p. 454, Knox, x-Qs. 220–224).

We cannot, however, be sure that the specimens produced by the defendants are specimens of spools and labels which were really used *for any considerable length of time.* Orrs & McNaught during the period that their thread was sold, changed the style, decorationt lettering and color of their labels (p. 449, Knox, x-Q. 179). The spools first sold were made of reddish oak and extra size (p. 449, Knox, x-Q. 180), which gave the thread a distinctive appearance. These large red spools were sold for " three or four years " (p. 454, Knox, x-Q. 218).

It thus appears that there were at least two styles of Orrs & McNaught spools—one with a label covering nearly the entire end and with gold lettering on a black ground ; another with black lettering on a gold ground. These two labels are quite the reverse of each other, and one is not nearly so similar to the Coats' labels as is the other.

When the fact of the existence of these two different styles of labels was called to the attention of Mr. Knox—a garrulous old gentleman of seventy-nine years—he did not know which was the one he had sold. He *presumed* he had sold them both, but was unable to say which style was *first* used, or *how long* either was used (p. 455, x-Qs. 230–234). It is quite pos-

sible that the style which seems to be an imitation of the Coats *label* may have been used only temporarily, if at all.

At all events, the Orrs & McNaught spools have no bearing on this controversy. They were introduced *long after* the Messrs. J. & P. Coats had adopted their labels, as we have seen, and *they went out of the market years before the present infringement began.*

Mr. Knox testifies that his agency of the thread definitely terminated in 1874 (p. 424, Q. 27), and the defendants' president, Mr. Hopkins, who had been an officer of the Merrick Company since 1865, and had devoted his time to the examination of the different threads in the market (p. 300, Qs. 44, 45), admits that Orrs & McNaught's thread was substantially out of the market in 1868. He testifies (p. 370):

"634 x-Q. Wasn't any of the Orrs & MacNaught thread being sold in this "country in 1877?"*

"A. There might have been a very little. I couldn't say certain.

"635 x-Q. About when did they stop making six-cord thread? A. Well, sir, I "couldn't answer that; they may be making it to-day; that thread was made in "England.

"636 x-Q. About when did the sales of the Orrs & MacNaught thread, to any "considerable amount, cease in this country? A. I should say *from 1865 to 1868.*

"637 x-Q. Have you ever known of its sale since that time? A. Yes.

"638 x-Q. When? A. I have bought some spools since then. I have "bought some within two years."†

"639 x-Q. Has it been on the market, except in the case of old stock left over "since about 1865? A. I should think it gradually went out as a popular thread "from 1865 to 1868. I don't think it has been very plenty since then."

In fact, many of the witnesses, and among them men who had been selling thread as the agents of the various manufacturers and retail dealers in different sections of the country had never even seen this thread.

See testimony of *Logie* (p. 135, Qs. 4 and 67), and *Baldwin* (p. 554, x-Q. 96–97).

The argument, therefore, that the Coats' thread was not, when defendants commenced to imitate it, distinguished from that

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* That is the year before the defendants commenced their infringement.

†(Perhaps some spools hunted up and purchased for use in this suit.)

of other makers by its numbers embossed in the natural colored border, and combined with its black and gold label is entirely without weight.

The Orrs and McNaught thread practically disappeared from the market some three years before Messrs. Coats began to use embossed numbers. On the admission of the defendants themselves the *whole billion* spools, by which this mark had become known as the mark of the Coats' spool, had been sold *since its complete disappearance* from the market.

Lord Chancellor SELBORNE thus speaks of a similar defense in *Johnson vs. Orr Ewing*, L. R., 7 App. Cas., 219, 226:

> "I do not think it at all necessary for the purposes of the present case to "enter into any inquiry as to the extent to which, or the period during which, "certain square labels of John Orr Ewing & Co., on which two elephants standing "together, with their trunks interlaced are represented, may have been used as "tickets for turkey-red yarn in the Bombay or in any other markets. They do not "appear to have been at any time sufficiently known to prevent the name 'Bhe hathi' "from being understood in those markets as distinctive of the plaintiff's goods; "*and for some years their use there seems to have been discontinued.*"

The only other claim on the part of the defendants to any early use of a *label* like the Coats' label is in regard to that of J. & J. Clark.

Only one specimen of this label could be found by the defendants. This was put in evidence as Defendants' Exhibit No. 22, and an attempt was made to prove by one ancient witness, Knox, that that label antedated the introduction of the complainants' gold and black label into this country in 1840. But the witness was wholly unable to identify the label in question, or even to tell the "colors or general arrangement of the labels" of J. & J. Clark in use as late as 1856 (p. 460, x-Qs. 271–282; p. 467, x-Qs. 307–332).

It is not even claimed that thread marked with this J. & J. Clark label ever became established or considerably used in this country.

The question, however, as to whether the complainants were the first to adopt a gold and black label is wholly immaterial, for the

charge of unfair imitation is not in the mere use, by defendants, of such a label, but of their use of the *whole dress* and ornamentation of the spool-head.

The label, *in itself*, may have been old, and even open to the public to use, just as the embossed numerals were, in themselves, public property, but the *combination* of the two characteristic features, first made by the complainants, and always thereafter constituting a distinguishing badge of their goods, is, we submit, susceptible of protection.

In their eager attempt to escape from the effects of this evidence, the defendants have been led into positions which are absolutely inconsistent with each other.

It was contended before the Circuit Court that the Coats' and all other spool cotton was always asked for by name, and was wholly known by name; that the black and gold labels, however much they varied in size and arrangement of colors, simply represented that the thread was six-cord, and nothing more; and that *the only use* of the embossed numerals, which had been used exclusively by J. & P. Coats, was to preserve the number of the thread after the label had been lost or become defaced, and did not at all serve to distinguish their goods.

And yet almost in the same breath it was urged that the use of the embossed numerals was so useful, and constituted so distinguishing a characteristic of the Coats' spools, that it gave the complainants almost a complete monopoly of the thread market.

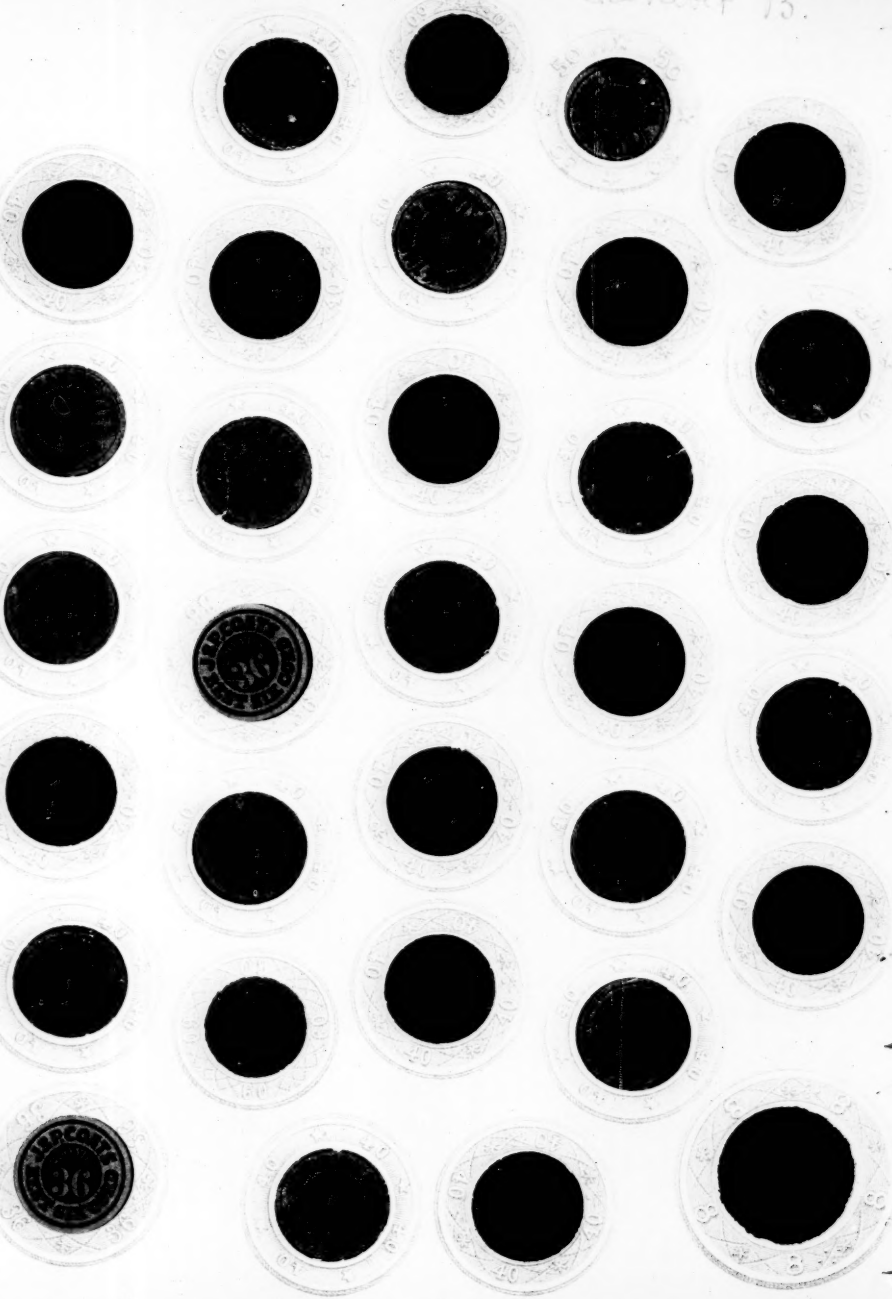
It may be true that spool cotton is almost always called for by the name of the maker; but this is quite immaterial, for it is the simulation of the general *appearance* of the Coats spools which renders it so easy to substitute the Merrick spools, and to pass them off without question and without exciting suspicion, *when the Coats' thread is named.*

It is undoubtedly a fact, that if, to-day, the appearance of the Coats' spool heads should be noticeably changed, and a spool should

Comp't annex

(Lake City Spools.)

Exhibit B.



be offered to a customer asking for Coats' thread *by name*, it would be primarily rejected, because it did not have the appearance of a Coats' spool, although it might bear on its label the legend "J. & P. Coats' Best Six Cord," and it could not be sold without an accompanying explanation of the change, and a guaranty that it was the genuine thread of the Messrs. Coats.

(3) *The defendants have simulated the distinctive appearance of the Coats spools in a way calculated to deceive the purchasing public.*

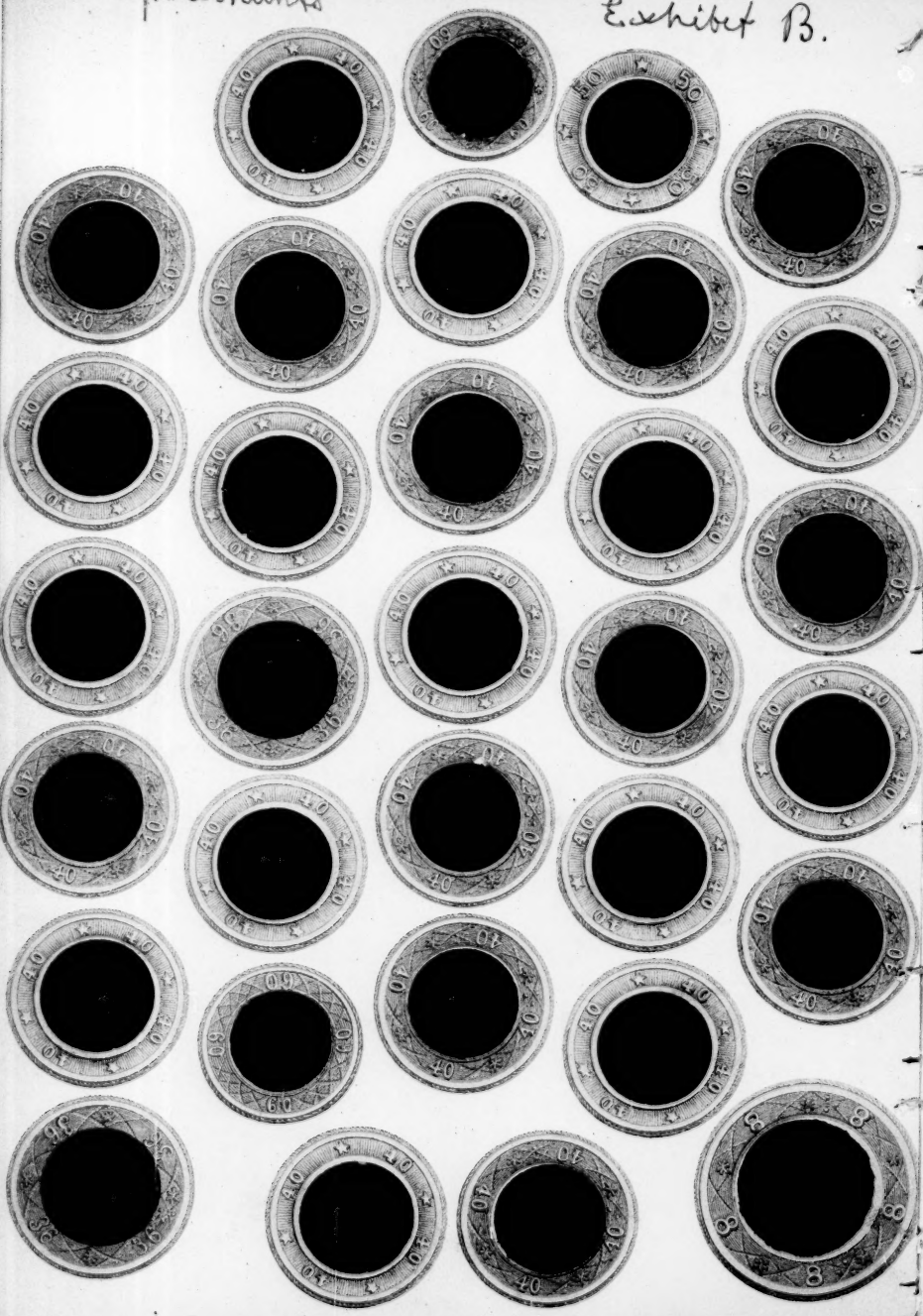
"Seeing, in such case, is believing," Mr. Justice FIELD has said in *Liggett and Myers Tobacco Co. vs. Finzer*, 128 U. S., 182,

"The judgment of the eye upon the two is more satisfactory "than evidence from any other source as to the possibility of parties "being misled."

We therefore present for the inspection of the Court a box, which is an exhibit in this case, containing thirty-two spools, which, according to the testimony (pp. 266-294), to which we shall refer more specifically hereafter, were actually purchased of retail dealers in the town of Lake City, Minnesota, by the witness who produced them, and who, in all cases, had asked for Coats' thread *by name* when making the purchase, and had taken what was given him by the dealers. The exhibit shows the result. A reproduction of the heads of this box of spools is printed on the opposite page.

This is not a matter upon which the testimony of witnesses, expert or otherwise, can throw much light, but rather one for determination by the senses of the Court. The best and only ultimate test is, as has been said, an inspection and comparison of the goods. If on such a comparison—not involving an express search for differences—it appears that there has been a designed imitation or simulation of the appearance of the complainants' spool, then the question is determined. For, if the Court can see with their own eyes that

Complainants (Lake City Spools.) Exhibit B.



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under ordinary circumstances a purchaser asking for Coats' thread, and having in his mind, in association with the Coats' thread, the distinctive features of their spool, would not be repelled from taking the Merrick thread, if a spool of it were handed to him, by the differences in appearance, but would take it without a suspicion that it was not Coats' thread, then the Court must see that a simulation has been carried out which has a tendency and is calculated to deceive.

That there are close resemblances between the Coats' spools and the Merrick spools every one must admit; and that there are detailed differences between the two, every one must admit.

It would indeed be a surprise to find no differences. The law was so well settled half a century ago that dishonest traders would never think of appropriating either the name or the marks of an established house, *without* change. The whole problem of successful fraud to-day is to get all the benefits of a close general resemblance, and at the same time escape all responsibility for the fraud.

Holding this box of exhibits, or this illustrated page, at a distance of a few feet, it is impossible to distinguish which is the Coats' and which the Merrick spool. All the differences in detail disappear and we receive only the general resemblance produced by the natural colored wood borders with their embossed numbers, and the labels with their similar arrangement of black and gold circles.

Of course if we were looking for the Merrick spools, and were determined to find them, we could pick them out, for they have the name upon them. So, also, if we go into a minute comparison of the details of the labels and ornamentation, we detect differences. But this is not the test by which to decide trade-mark cases. Such is not the doctrine of this Court in *McLean vs. Fleming* and *Gorham Co. vs. White;* such is not the doctrine of the courts in cases of "unfair trading."

Exact similarity is not required. "Colorable imitation, which "requires careful inspection to distinguish the spurious trade-mark "from the genuine, is sufficient to maintain the issue." We can overlook differences which we have to search to find.

So in *Croft vs. Day*, from which we quoted at the beginning of our brief, the Court said:

> "There are many distinctions, even more than have been stated, between these "two labels. It is truly said, that if any one takes upon himself to study these two "labels, he will find several marks of distinction. On the other hand, the colors "are of the same nature, the labels are exactly of the same size, the letters are ar- "ranged precisely in the same mode, &c." An injunction was granted.

Again in *Seixo vs. Provezande*, *supra*, Lord CRANWORTH said (p. 195):

> "If the question turned on the inquiry, whether a person having a cask of the "plaintiff's and a cask of the defendants' placed before his eyes could mistake the "one for the other, there could be no doubt as to the result, for the marks on the "one and on the other are altogether different. But that is not the question."

The question is, rather, what is the effect on the eye of the appearance of the ends of these spools. Viewed cursorily and not critically, do they look as if they came from the same establishment or not? Is it the *general resemblance* OR the *detailed differences* which would strike "a casual observer, as most purchasers are?" Would a person familiar with the Coats' thread, asking for Coats' thread from a shopkeeper and expecting to receive what he had asked for, accept a spool of Merrick thread as Coats' thread without hesitation and without any disposition to criticise or examine it by reason of any differences apparent in the appearance of the spool?

We believe that such a person would accept the Merrick thread as Coats' without suspicion. But we believe also that such person would instantly reject the thread of any other manufacturer. Hand a lady inquiring for Coats' thread a spool of Willimantic. The instant her eye fell upon it, she would recognize the want of correspondence of its peripheral band colored in black with the appearance of the Coats' spool, as, from long familiarity with it, such appearance was fixed in her mind. Again, no person wishing to purchase Coats' thread would, through any mistake, be deceived by a spool of Clark's or of Kerr's or of Brooks'. Each one of these spools has a distinctive appearance, an

individual expression, which a purchaser *at once* and *instinctively* recognizes.

But, on the other hand, there is nothing about the appearance of the Merrick spool to arouse suspicion. Purchasers do not carry in their minds details. Probably not one person in a hundred who has used Coats' thread could tell off-hand what the peculiar marks on the head of the spool were. Neither could one person in a hundred describe the details of the ornamentation of a silver dollar, or an ordinary postage stamp. And yet every person accustomed to use Coats' thread would carry a general idea of the appearance of the spools. We must not forget, too, that the great majority of purchasers assume, as a matter of course, that they will receive what they had in their minds to procure ; and it should also be borne in mind that, in a great many cases, the thread is taken from a Coats cabinet where the Merrick thread is mixed in with the Coats' and given to the purchaser, who, in buying half a dozen spools, may get one or two or even more spools of Merrick thread.

It is from this point of view, the stand point of the ordinary, unsuspicious purchaser, and bearing the above considerations in mind, that we invite the Court to examine this exhibit and say whether or not the defendants would probably be enabled by their simulation, to palm their goods off as the goods of the complainants ; whether or not the imitation is *calculated* to *deceive*.

The question, we repeat, is not whether the purchaser *could* not discover that the name of the Merrick Company appeared on the spool instead of the name of the Coats' Company. The question is whether she *would, naturally and probably*, discover the difference. If a fraud is contemplated, it will be executed in case the general appearance of the one spool head to the eye in so close in point of resemblance to the general appearance of the other as to prevent it from repelling the purchaser by creating the suggestion on its face that it is *not* what he wants.

(4) *The defendants simulated the appearance of the Coats' spools with the intention and for the purpose of defrauding the complainants and the public.*

It is believed that a reading of the evidence will show that the acts of the defendants have been most carefully studied; that, they have sought to build up their business from a small beginning upon the reputation and at the expense of the complainants, and that their whole course has been directed, with the aid of skillful counsel, to the attainment of their end in such a way as to avoid all reponsibility for their acts.

It is necessary for an understanding of the significance of their acts, to consider briefly the parentage and early history of the defendant company.

(a) Prior to 1878 the defendants had been known only as THREE-CORD *thread makers. Their* SIX-CORD *business had been small, and had been done under fictitious names.*

Prior to 1865 the manufacture of spool cotton was carried on at Willington or Mansfield, Connecticut, under the name of Merrick Bros. & Co. (p. 336, Hopkins, x-Q. 297; p. 339, x-Q. 324), this firm being the predecessor of the defendant company. In the year 1865, the Merrick Thread Company, the defendant, was organized and moved to Holyoke, Massachusetts, where it has since been located (p. 307, Q. 95). Merrick Bros. & Co. made a three-cord glacéd thread (p. 388, x-Qs. 317, 324), which was put up in spools having a red, white and blue label (p. 342, x-Qs. 355, 356).

The Merrick Thread Company began to make this same three-cord thread in 1865, and have continued to make it and put it up in spools having the same red, white and blue label, and the name of "Merrick Bros. & Co." up to the present time (p. 342, x-Q. 358). In the year 1868, however, they began to manufacture six-cord thread (p. 306, Q. 90; p. 342, x-Q. 360), but for a period of ten years, from 1868 to 1878, they made and sold all their six-cord thread under the name of "The American Thread Co.," except what they threw out

as " second," and put up under the name of " Crowley " (p. 346, x-Q. 400). Both of these names are fictitious, no such person or firm existing (x-Qs. 390, 405). They also made a three-cord thread which they labeled " Crowley " (p. 348, x-Qs. 414, 1038), and, from about 1872 to the present time, still another three-cord thread which they have labeled " Carlisle," the name of a defunct thread manufacturing company (p. 345, x-Q. 386 ; p. 414, x-Q. 1037).

The labels used on spools of all these different threads are found reproduced on the opposite page.

Mr. Hopkins describes the adoption of the label for their first six-cord thread, and the reasons for not making it under their own name, as follows (p. 305) :

" 90 Q. When did the Merrick Thread Co. begin to make and put upon the " market 200-yards six-cord thread ? A. In the early part of 1868.

" 91 Q. Describe the black and gold label which they first used upon it ? A. It " was exactly like the ones marked ' A.' in the card herewith produced, except " that the number designating the size of the thread varied.

" 92 Q. How long did your company use that label on that thread of that " length ? A. About ten years.

" 93 Q. During that period, what other black and gold label did the company " use on some of its six-card thread, to wit, some of longer length ? A. We used " one exactly like the one marked ' B.' in Exhibit 27, only the numerals varied on " different numbers of thread.

" 94 Q. How long was that used on such length of thread ? A. About nine " years."

" 95 Q. What change was made, when was it made, and why ? A. When the " company was incorporated in 1865, the former president, Mr. Johnson, wished to " have the name of the company the American Thread Co. ; Mr. Merrick wished " to have it the Merrick Thread Co., and it was finally decided to name the com- " pany Merrick Thread Company. When we commenced to make six-cord thread, " in 1868, Mr. Johnson, then president, claimed that the 200-yard six-cord thread " should have the name American Thread Co. on it, and it was finally decided to so " have it, in order to designate more closely the six-cord from the three-cord thread, " which had the Merrick name on it. About 1877 our business of six-cord thread " had been increasing proportionally to the three-cord, until the sales of six-cord " were larger than the sales of three-cord. The company, wishing to have its own " name appear on their largest production, decided to change the name from the " American Thread Company to the Merrick Thread Co. on the six-cord thread."

(See also p. 320, Q. 171.)

From this account of the early years of the defendants, we find that up to the year 1878 the Merrick Thread Co. had been manufacturers of *three-cord* thread only, *under its own name* or a similar

MERRICK THREAD COMPANY'S 200-YARD SPOOL HEADS.

THREE-CORD THREAD "GLAZED,"

Used from prior to 1865 to the present day.

("Complainants' Exhibit Comparative samples;" p. 342, Hopkins, x-Qs. 355–358; p. 348, Hopkins, x-Q. 413).

THREE-CORD THREAD.

Used from about 1872 to the present day.

("Complainants' Exhibit Defendants' Carlisle Spool;" p. 345, Hopkins, x-Q. 386; p. 414, Hopkins, x-Q. 1037.)

THREE-CORD AND SIX-CORD THREAD, "SECONDS."

Used from 1865 to the present day.

("Complainants' Exhibit Defendants' Crowley Spool;" p. 345, Hopkins, x-Q. 388; p. 414, Hopkins, x-Q. 1038.)

SIX-CORD THREAD.

Used from 1868 to 1878.

("Defendants' Exhibit No. 27;" "Defendants' Exhibit No. 45;" p. 306, Hopkins, Qs. 90–94.)

name, and that although they had made and sold six-cord thread from 1868 to 1878, it had been only *entirely under fictitious names.*

In brief, in the year 1878, at the beginning of the acts complained of, the defendants were a small concern of thread-makers and *wholly unknown as manufacturers of six-cord spool cotton.*

By the defendants' own testimony, the Merrick Thread Co. was then the smallest and the Messrs. Coats the largest manufacturers of six-cord spool cotton in the country (p. 367, x-Qs. 613-616).

We have now a motive for the acts of the defendants, which, we submit, is not inconsistent with a plan on their part to build up their business on the reputation of the complainants' goods.

Mr. Merrick, the originator of the defendant company, had been connected as a workman, at least, with a preceding concern, the Willington Thread Co., which had been enjoined from imitating Coats' spools and using Coats' name, and which, singular to note, also called its thread "American" (p. 337, x-Qs. 299-313, p. 347 x-Qs. 404, 408).

The facts proved are as follows:

(b) The defendants recognized the difficulties to be encountered by a **new concern** *in introducing its thread.*

Mr. Hopkins testifies (p. 324):

"202 Q. State some of the difficulties which the introducer of a new thread "has had to encounter from the time your company commenced its business up to "the present time? A. *It is a very hard job to introduce a new brand of thread;* "we have had to advertise and give away large quantities of spool thread to get "our *name established* as makers of spool cotton: we have had to send traveling "men through the different States and get the people to try samples of our "thread; we have had to overcome a great deal of prejudice that was formerly "had in favor of foreign thread; people have told us that we must not put the "name 'American' upon our spool; that it would hurt the sale of it."

And so, (Q. 220, p. 327):

"A. I think it would be about impossible to introduce a new six-cord thread "without using a black and gold label of the usual form."

So the witness, when recalled, says of the difficulty other manu-manufacturers of thread have had in introducing their goods (p. 718):

"15 Q. Chadwick's thread has been mentioned in the recent testimony. State "what thread that is, and at what price it is sold? A. It is a 200-yard thread re- "cently introduced or trying to be introduced into this country, of good quality, "and is offered to the trade, and is advertised as a six-cord at a less price than the "Merrick's six-cord.

"16 Q. How is it succeeding, and what obstacles is it meeting with in addition "to the obstacles any new six-cord thread meets with? A. So far as I can learn, "it is making very slow progress, and the trades say that it is partly on account "of the label not being of the well-known badge of six-cord thread, and the people "think that it is a three-cord cotton from the fact that it hasn't the black or gold "label.

"17 Q. What have you learned as the reason for Kerr's change from another "label to a black and gold label? A. I learned from Mr. Kerr's manager, of New- "ark, that it was impossible for them to introduce their six-cord 200-yard thread "to any great extent under the label which they formely had upon it and with "their old shape of spool, and that they had to change to the usual form of spool "and the black and gold label."

(See also p. 725, x-Qs. 84–90, in regard to the difficulty of introducing Kerr's and Chadwick's threads.)

"91 x-Q. Do you believe that you could have introduced your six-cord 200- "yards thread upon the market to the extent you have if you had not adopted the "present appearance of your spools, including the black and gold label and the em- "bossed numbers on the spool head? A. *I think if we had made a thing radically "different we should have had the same trouble that others have had.*

"92 x-Q. The same trouble in introducing your six-cord thread, do you mean? "A. Yes, sir.

"96 x-Q. * * * A. I can't answer different from what I have; that is, that, "other things being equal, I think that the black and gold label and the numbers "on the wood, making it permanent, is a help towards introducing a new six-cord "thread."

Special attention is called to Mr. Hopkins' testimony on pages 725 to 727, part of which has been quoted above, as bearing on this point.

(c) They wrote to Mr. Conant to get from him the dies used by Coats to emboss their spool heads, and were informed that only on Coats' order could this be permitted. They never asked for any such order or permission.

The letter from the defendants to Mr. Conant referred to above, which is printed on page 312 of the record, is as follows:

"MAY 11, 1878.

"H. CONANT, Pawtucket, Rhode Island:

"DEAR SIR—Will you have the kindness to inform us where we can get the dies "made for embossing the ends of spools, such as are used on the Coats' thread "spools, and much oblige

"Yours truly,

"MERRICK THREAD CO.,

"Per C. W. R."

The initials are those of Mr. Rider, a clerk of the Merrick Company.

Mr. Conant's answer to this request, which is also printed (p. 312), is as follows:

"PAWTUCKET, May 13, 1878.

"MESSRS. MERRICK THREAD CO.

"GENTS—In reply to your 11th, just to hand, we don't know of any parties "where you can get those dies for embossing spools on the end 'like Coats' thread "spools,' made for you.

"The Conant Thread Co. make all used on their work, but they would make for "other parties only on order from J. & P. Coats or their agents in N. Y., Messrs. "Auchincloss Bros.

"Yours truly,

"H. CONANT."

It is to be noted that this correspondence is with Mr. Conant *personally*, not with the Coats Co.

Perhaps it was a cunningly devised attempt to obtain some sanction for Merrick's adoption of the Coats embossed numbers, by getting Conant to write where they could get dies to emboss, and then claiming this as a permission so to do. Not getting the answer desired, they carried out what was, perhaps, a preconceived plan, and put the embossed numbers on the spools.

(d) When the defendants first put their spools on the market WITH NUMBERS *on the peripheral band of the spool, they did it by* STAMPING *(i. e., sunken figures), instead of by* EMBOSSING *(i. e., raised figures).*

(e) They allege that the reason for adopting "embossed" numbers instead of "stamped" was to make the number plainer.

Mr. Hopkins' testimony on this point is found on page 311 (Qs. 129-134), on page 356 (x-Qs. 508-512) and on page 394 (x-Q. 892) of the record.

See also "Defendants' Exhibit No. 28, Merrick's Early Spool, "with Stamped Number," "Complainants' Exhibit Defendants' "First Style Stamped Spool" and "Complainants' Exhibit Stamped "Spool before 1878."

Mr. Hopkins says (p. 399):

"922 x-Q. Is there any advantage to a manufacturer of spool cotton in making "the spools due to the fact that numerals are embossed on the heads of the spools "so as to be raised up from the surface, as distinguished from stamping such "numerals on the wood of the spools so that the figures are depressed? A. I "think they would be more readily seen to be raised.

"923 x-Q. You think the embossing, therefore, is an advantage? A. I think I "should prefer it."

So also in answer to x-Q. 938:

"A. * * * I say we considered that our embossed figure was a better way "and more distinct than the sunken figure, and in that we thought our goods *would* "*be more salable* to be done in that way than in that which was not so good."

And on re-direct (p. 407):

"987 Re-d. Q. What is the utility, if any, of stamping a raised numeral over "stamping a depressed numeral—that is, in cameo, instead of in intaglio? A. I "think it can be more readily seen, and makes a better, nicer finish—*a better-* "*looking spool.*

"996 Re-d. Q. Do you think there is any advantage to the consumer of stamp- "ing raised numerals on spools, as in coining metals; or, in other words, embos- "sing numerals on spools, over and above stamping depressed numerals, except "that by means of the raised numerals the size of the thread could, perhaps, be "a little more readily observed? A. That is all the difference, seeing it plainer— "a little plainer."

We believe that the Court will say, on inspection, that *stamped* numerals are really *more plain* than *embossed* numbers.

If so, *some other reason* for the change must have been the real one.

Attention is called to the cross-examination of the witness on

pages 399 to 403, in which he utterly fails to give any satisfactory explanation of the reason why they adopted the embossed numbers at this period instead of the sunken numbers they had previously used (p. 357, x-Qs. 510, 511 ; p. 400, x-Qs. 931 to 933).

(f) In introducing their "Merrick Thread Co." six-cord thread with the small black and gold labels and embossed numbers, they REVERSED THE ARRANGEMENT OF COLORS *on their old American and Crowley labels, and made the arrangements the same as in the Coats label.*

The *old* American label had a *light centre* and black outerband on which the names appeared in gold letters. The label, Merrick & Co., 1878, has a *black centre* and *gold outer band* with black letters just as found on the Coats label.

If the defendants had simply reduced the size of their old label so as to allow its use in combination with the embossed border, a possible explanation might be found in a desire to make use of their old label and the utilities of this embossed numeral, although, as we have shown, this ought have been done in a way that would not have brought on them the charge of imitating the Coats spools.

There is, however, no possible way of accounting for the reversal of the arrangement of colors in these labels, in connection with the other facts noted, except on the theory of a preconceived plan to make their spool heads approach in general appearance as near as might be to the Coats' spool heads.

(g) Having from 1868 to 1878 used a black and gold paper label, for "long-length" six-cord thread, they changed their 500 yards " LONG LENGTH *" spool-head in 1878, by leaving off the paper label and using embossed numbers, stamping, &c., so that they nearly resembled the Coats 500 yards "long-length" spools, on which no paper label was ever used, but only embossing and stamping.*

Mr. Hopkins testifies that, up to 1878, the defendants used a black and gold paper label with the name "The American Thread

Company" on all their long-length spools of six-cord thread (p. 306, Qs. 93, 94; and see "Defendants' Exhibit No. 27 B," and "Defend-" ants' Exhibit No. 46").

Now, Messrs. Coats put up their long-length, six-cord thread on spools with their name and the words "Best Six-Cord" *stamped* in a circle around the centre of the spool head, and with *embossed numerals* on the periphery surrounding the name (see Schedules E^1 and E^2 annexed to Bill of Complaint). They had *never used paper* labels on any of their long-length spools (p. 67, H. B. Auchincloss, Q. 35). So what do the defendants do in 1878 or 1879 when they adopt the Coats label and embossing on their 200-yard spools? Mr. Hopkins answers this (p. 357):

"507 x-Q. How did you alter your spool heads or labels, or either of them, for "the long-length spools at the time that you gave up the use of the American "Thread Company label for most, if not all, of such thread? A. We altered the "label from the 'American Thread Company' to the 'Merrick Thread Company' "on the 1,200 and 2,400 yards, and we about that time commenced to put up 500 "yards six-cord without any label. There was no change made in this spool other-"wise that I know of. The name Merrick Thread Company was stamped in the "500 yards on the wood. There was no label on it. The number of thread was "embossed on the spool head.

"509 x-Q. But it was in 1878, was it not, that you commenced to use long-"length spools without labels, and with the name stamped and numerals embossed "around the spool head? A. We commenced to put up 500 yards six-cord thread "about that time with the name stamped on the wood and the numbers embossed "on the end of the spool."

We find, therefore, that on their 500-yard six-cord spools they left off the paper label they had been using and stamped their name in a circle on the spool head and surrounded it with a circle of embossed stars, just as the complainants had been doing, (see also Schedule H annexed to bill of complaint).

They did not, however, find it worth their while to imitate the Coats 1,200 and 2,400 yard spools, and so they only changed the name on those spools and continued to use the paper labels (p. 58, x-Q. 522; and see "Complainants' Exhibit Defendants' Long Length "Paper Label Spool").

We do not have to go far for an explanation of this seeming inconsistency. The 500-yard lengths are sold, to a certain extent,

STYLE OF "LONG LENGTH" SPOOLS, WHICH PROBABLY WAS MOST USED BY RETAILERS AND FAMILY TRADE.

Coats'
500 Yards.

Merrick's
500 Yards.

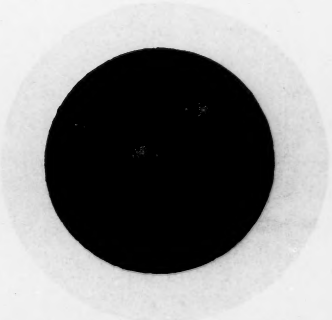
STYLE OF "LONG LENGTHS," WHICH PROBABLY WAS ONLY USED BY MANUFACTURERS AND JOBBERS.

Coats'
1200 Yards.

Merrick's
1200 Yards.

Coats'
2400 Yards.

Merrick's
2400 Yards.



though not nearly to the same extent as the 200-yard length, to the family trade, and go into the hands of purchasers who buy only a single spool or a few spools at a time, and who would be likely to be deceived by an imitation of the appearance of the Coats' spool heads. On the other hand, the 1,200 and 2,400-yard lengths, go only to large purchasers, to manufacturers and jobbers, who buy directly of the agents, and who could not be deceived in the thread they were buying. This is very evident, and furnishes additional proof of the care with which the defendants planned their cause of action.

(h) They adopted the embossed numerals only in the classes of goods in which they came in competition with Coats, viz., 200 yards six-cord thread, and 500 yard "long-length" six-cord thread, though it is obvious that in point of utility the embossed numbers would be equally as useful and important on three-cord as on six-cord thread, and on this 1,200 and 2,400 yard six-cord as on the 200 and 500 yard lengths.

See samples of defendants' three-cord thread in Schedule F, annexed to the bill of complaint, and also in "Complainants' Exhibit Comparative Samples," and among defendants' exhibits.

The testimony shows that the Messrs. Coats do not put up *three*-cord thread on 200-yard spools to any extent (except the high numbers—110 to 200), whereas, the defendant company gained their original reputation as manufacturers of this thread, and it was not till about the year 1878 that their production of six-cord thread equalled in amount their production of three-cord (p. 307, Q. 95).

It is, therefore, very suggestive that it was only *on six-cord thread*, of which the defendants were the smallest and the Messrs. Coats the largest manufacturers (p. 368, x-Q. 616), and only on the two shorter lengths of six-cord thread—the lengths which go into the hands of small retail purchasers—that they should have found it useful and plainer (?) to adopt the embossed numbering, which, unquestionably, makes the Merrick spool heads more like the Coats than they would be if the numbering was left off entirely, or than if

they were numbered by stamping in colors, or by stamping depressions into the wood, as on their old-style spools, or by embossing the numbers on a black spool-head.

(i) They further simulated the appearance of the Coats' spool heads by making use of embossed stars between the embossed numerals on the periphery.

These stars were not shown or suggested in the Conant Patent (p. 25), but were made a *preferred feature of the Coats trade-mark* of 1875 (p. 26), and are largely used on *many* of the numbers of Coats' spools. The defendants try to excuse this by saying that they had always used a star in the *centre* of their *labels*. Mr. Hopkins says (p. 309):

"118 Q. What were your reasons for putting the embossed star between the "numbers in the periphery? A. When we had the knarls first made to do that "work they were made perfectly plain except the figure. We tried them for a "short time and found that they slipped, as there was so much smooth space on "them and destroyed the figures. Our mechanic, Mr. Page, said that we must "have a bearing between the figures in order to make the knarl work. I told him "he could have some cut with the star between the figures, which would make an-"other bearing, as we had always had the star in the centre of our ticket. He had "them so made and they have remained so to this day; there has been no other "change; this is on the 200-yard six-cord thread."

This answer is wholly unsatisfactory. The defendants could have secured these extra "bearings" without making use of the stars shown in the plaintiffs' trade-mark, and used on many of their spools. The Conant Patent had *eight* numerals and a chain of loops on the peripheral border of the spool head. The defendants could have got all they wanted by repeating the numerals in the places where they did use the stars. We submit that it is very evident that they were copying the plaintiffs' spools, and not making use of the Conant design, and that this, rather than the fact that they had formerly used stars in the centre of their paper labels, was the real reason for their use of the embossed stars.

(j) The first spools with embossed numerals which they put out omitted their own name, and the explanation given of this suspicious fact is not warranted by fact.

This omission of the name of the defendant company in connection with the *first* spools sent out is most significant.

This omission is referred to in the letter to the Merrick Thread Co. from Messrs. Coats' attorney (to which we shall call attention in a later portion of our brief), as follows (p. 314):

> " We find that, not only have you adopted an embossed spool head, re-
> " sembling in all respects the spool head of Messrs. J. & P. Coats, but you have
> " also, in one case, neglected to put your own name upon the spool head, in order
> " to distinguish your manufacture from that of our client."

President Hopkins, in his examination, admits that he sent out to their agent some spools of six-cord thread that did not have the Merrick name stamped on them, but he says that he did not send out more than twenty dozen such spools, and he has an explanation all ready (p. 317, Q. 151), to wit, that the company *did not have the die ready to stamp the name.*

It should be noted, however, that they had, previously to 1878, stamped the name " Merrick Thread Co." on embossed spools with a stamp apparently identical with that *afterwards* used (see " Complainants' Exhibit Defendants' First Style Stamped Spool "); and, if *only twenty dozen* spools were ever sent out, it is singular that some should have been called to the attention of the Coats, and formed the subject of formal complaint.

(k) The fact that the defendants afterwards used their own name does not protect them.

Mr. Hopkins says (Q. 152) that he never sent out a single dozen or a single spool which had a *label* without the words " Merrick Thread Co." or the words " American Thread Co." upon it, and he claims that, by putting their name on, they have given sufficient notice to the public that it is *their* spool.

There are numerous cases, however, which hold that that fact is no answer. A man may put his own name on his goods, but if he associates with it marks, *indicia, appearances*, which he has imitated from his rival, the mere fact that he has used his own name will not protect him.

But Mr. Hopkins insists that the thread is *asked for by name.* This surely can make no difference. Nearly one billion spools, as we have said, were sold between the years 1875 and 1883, bearing the distinctive expression of the Coats spools on their heads. It is by this distinctive appearance that they are known, and it is by the simulation of this same distinctive appearance that the defendants are enabled to pass off their thread without suspicion, *when Coats thread is asked for.*

On the other hand, having imitated the general appearance of the Coats spool, so closely as not to excite the suspicion of the purchaser, the very fact that the defendants have put their own names on their labels, adds to the injury done to the complainants. The purchaser, eventually finding that she had brought home Merrick thread with her, would be very likely to use it rather than take the trouble to return it. Then she might *ask* for Merrick thread the next time she went to purchase thread.

A similar question was before the Court in *Menendez vs. Holt*, 128 U. S., 514, and it was there said :

"It is no answer to their action to say that there was no invasion of that right "*because the name* of S. O. Ryder accompanied the brand upon flour sold by the "appellants, instead of the names of Holt & Co. That *is an aggravation*, not a jus- "tification, for it is openly trading on the name of another—upon the reputation "acquired by the device of the true proprietor (*Gillott vs. Estabrook*, 47 Barb., 455; "48 N. Y., 374; *Coats vs. Holbrook*, 2 Sand Ch., 586)."

As the Court said in *Croft vs. Day*, 7 Beav., 84 (Cox Am. T. M. Cases 649, 652) :

"It is perfectly manifest that two things are required for the accomplishment "of a fraud such as is here contemplated: First, there must be such a general "resemblance of the forms, words, symbols and accompaniments as to mislead the "public. And, secondly, a sufficient distinctive individuality must be preserved, "so as to procure for this person the benefit of that deception which the general "resemblance is calculated to produce. To have a copy of the thing would not do,

"for, though it might mislead the public in one respect, it would lead them back to "the place where they were to get this genuine article, an imitation of which is "improperly sought to be sold. *For the accomplishment of such a fraud it is "necessary in the first instance to mislead the public, and, in the next place, to secure "benefit to the party practicing the deception by preserving his own individuality.*"

The defendant did not dare to adopt the Coats' name as well as the Coats' mark. The Willington Company tried that, and were promptly enjoined. So they took *what they thought* a much safer and more profitable course, and used their own name. If they had continued to send out their thread *without any name* upon it, their gains would have measured by just the amount of thread they were enabled to pass off as the thread of the complainant, and no more than this. But by adding their own name they have not only made their course *apparently* a safer one, but they have built up the large business of which they make considerable boast.

(l) The very differences in detail between the defendant Merrick's labels and the Coats' labels are evidence against the defendants.

There are differences in the detail of the ornamentation of the spool heads of the two companies, and President Hopkins is well aware of the fact. In answer to questions of his counsel (p. 322, Qs. 189–191), he recites them all, and his re-direct examination is almost wholly devoted to magnifying them. He states that although the defendants have used the embossed *numerals* and the embossed *stars* between the numerals on the wooden periphery of the spool head, they have *never put in the cross lines* or anything in place of the cross lines of the Coats' spools (p. 405, Re-d. Q. 975) and he is so well satisfied with the great difference he has thus pointed out, that he repeats it a little later in answer to question 989. It was unnecessary, however, to omit these cross lines, even if it was deemed advisable to make differences in their labels, because they were as much a part of the Conant design patent as the numerals themselves (p. 24), and if the defendants had a right to make the use they did of numerals and stars, there was certainly no need of omitting the cross lines.

Mr. Hopkins thinks that the star in the centre of the defendants' labels enables the public to distinguish the defendants' goods and testifies that it was put there for that purpose (p. 406, Re-d. Qs. 977, 978). He then gives the results of some "rough tests" he has made with a view to showing how easily distinguishable the defendants' thread is (p. 415, Re-d. Qs. 1047–1061).

These experiments, he thinks, prove conclusively that the public would never mistake Merrick thread for Coats, because customers buying thread examine it at a distance of about a foot or two (Re-d. Q., 1060), while *he* has been able, under favorable circumstances, to distinguish a spool of the finer numbers of Merrick thread at a distance of three feet, and of the coarsest numbers at twice that distance (Re-d. Q., 1047).

President Hopkins further testifies that the defendant company "spent at least a thousand dollars in trying to get them [the labels] "plain and distinct," so that they would plainly inform the public that they made the thread upon which the labels appeared (p. 308, Q. 108), and that he gave the matter his personal attention (Q. 109). But he also testifies (p. 308, Qs. 105–107, p. 322, Qs. 187, 188) that he has examined all the cases where suit had been brought by spool-thread makers for infringement of their trade-marks or trade-rights in labels or other designating marks. Such a study of the cases as he made must apparently have convinced him that though he could not use the Coats name or any imitation of it, yet that it was safe to copy all the marks and distinguishing features of the Coats spools without change.

His whole study, it seems to us, was to get all the advantages of a simulation of the *general appearance* of the Coats' spools, and at the same time to escape all responsibility for his acts. The differences of detail were made for no other reason than to give Mr. Hopkins and other witnesses an opportunity to spread them out on the record of this case as proof that they did not intend to commit a fraud.

It is evident that Mr. Hopkins, in his search for cases, did not run across the case of *Johnson vs. Orr Ewing*, L. R. 7, App. Case, 219,

before the English House of Lords. If he had, he would not have rested easy with the few differences he left in the appearance of his spool heads. In that case Lord Blackburn said (p. 222):

> "Their counsel argues that * * * the differences between the tickets were "so great that the defendants could not intend to mislead. *I think that the differ-* "*ences were so great that the defendants hoped that no court would say that the use of* "*the two elephants could mislead.* IN THAT THEY HAVE BEEN MISTAKEN. I certainly "think that, as against these defendants, this is very strong evidence, and I do not "think any hardship is inflicted on honest traders by holding that, *if they do not* "*take pains when making a new trade-mark to make it quite unlike an established one,* "THEY DO SO AT THE PERIL OF MAKING EVIDENCE AGAINST THEMSELVES." (Italics ours.)

If Mr. Hopkins had been aware of this decision it is probable, at least, that he would have retained the arrangement of colors in his old American labels, and he might even have been willing to retain *stamped* numerals if he must have numerals at all, or if he must *emboss* to have embossed his numerals upon the *other end* of his spools, or, at least, upon a black spool head, if he still persisted in availing himself of the utilities of the Conant Patent.

(m) The defendants used boxes with an arrangement of marks and labels very similar to those of the Coats' boxes.

Compare the various exhibits and boxes of complainants and defendants in evidence in the case, and especially in regard to the *appearance of their ends.*

(n) They have put up five dozen boxes of assorted colors, with almost an identical arrangement of the spools of different colors therein with those of Coats', and having the ends so similar that, as the boxes stand on the shelves they can hardly be distinguished.

A five dozen box of Merrick's colored spools, such as is referred to above, is offered in evidence as "Complainants' Exhibit Five Dozen Box Merrick Colored Spools," and a box containing five dozen J. & P. Coats' colored spools is also offered as "Complainants' Exhibit Five Dozen Coats' Colored Spools."

The testimony of W. F. Willis (p. 208) shows that the five-dozen

box Merrick spools was bought from the Merrick Thread Company, and is in the same condition, and shows the same arrangement of the colored spools, as when bought.

It appears (Q. 6) that these five-dozen boxes are set on the shelves by dealers, so as to show the end labels thereof; and, in putting these two exhibits one on top of the other, and looking at their ends at a distance, the Court will see that the Merrick box is almost an exact copy of the Coats' box in appearance. It has the same wording outside of the labels, and three similar labels stuck on the end. And when the covers are taken off and the arrangement of colors closely examined, it will be seen that the arrangement of the Merrick colors is almost identical with that of Coats, as they lie side by side, so that the witness Willis could well say (p. 210):

"10 Q. In your opinion, as those boxes lie side by side, open and uncovered, is "that similarity such that a person not paying close attention would be liable to "mistake one brand for the other? A. Well, I can only answer that in one way: "that, if that box laid on one ledge, as it is now (pointing to the Merrick's box) "I should have picked it up for a box of Coats' cotton."

The witness testifies to knowing of Coats' colored six-cord cotton being put up in boxes with ends like the Coats' Exhibit for ten years (A. 5).

In connection with these two five-dozen boxes, the witness Hornblower (210 to 212) testifies that the Coats' box is packed in an exact order, in accordance with a packing order, which is produced by the witness and marked "Exhibit Coats' Packing Order," and the exact colors shown in the Coats' box have been used since prior to the date of the packing ticket, "Exhibit Coats' Packing "Order."

The testimony and exhibits show that the defendants are, in these five dozen boxes also, endeavoring to imitate the appearance and putting up of the complainants' spool cotton, and thus to take advantage of their greater reputation in the market.

It may be added that no explanatory testimony has been offered by defendants in connection with these five dozen boxes of colored thread, just above referred to, or of the imitation which appears to exist on the part of the Merrick to the Coats' boxes.

(o) They were promptly notified by Messrs. Coats' attorneys of their infringement, but persisted in it, although all other infringers discontinued.

In this connection reference should be had to the letter of Messrs. Varnum & Harrison, attorneys for J. & P. Coats, to Lyman R. Hopkins, president of the Merrick Thread Company, under date of August 12, 1879, which is printed in page 313 of the record, and which sets forth at length their claim against the Merrick Company for its use of spool heads resembling those of the Coats' spools.

It will be seen by the bill for the first dies used by the defendants (p. 396) that it was not until June, 1879, that the dies for the numbers 8 to 90 were finished. It could not, therefore, have been prior to June or July, 1879, that the infringing goods were put upon the market. The notice from Messrs. Coats' attorneys in August was very prompt.

See, also, testimony of H. B. Auchincloss (p. 62, Q. 28).

(p) President Hopkins' letter of August 19, 1879, in answer to the notification by Coats' attorneys above referred to, fully exhibits the keenness and unfairness of statement of the man.

Mr. Hopkins' letter (p. 315) is as follows :

"HOLYOKE, MASS., Aug. 19, 1879.

"VARNUM & HARRISON,
"Attorneys for J. & P. Coats, 110 Broadway, N. Y. :

"GENTLEMEN—Your favor of the 12th inst. came duly to hand and has our "careful attention. In reply, would say that we never designed or desired, in em- "bossing our spool heads, that anyone buying them would think or imagine the "thread was manufactured by Messrs. J. & P. Coats. On the contrary, *we "designedly made the embossing of a different pattern from that of theirs.* In relation "to the spool you have of ours, that has not got our name on, it happened in this "way : Our agent in New York was in a hurry for some of the thread, and the die "for stamping *was not ready*, and we sent a few dozen before it arrived; but for that "the name Merrick Thread Co. would have been on every spool, as it is now. In "relation to embossing spool heads in our spool cotton, we supposed we had a per- "fect right to do so, *as our Mr. Merrick made spool cotton with embossed heads thirty "years ago, and we have other spools now before us made with embossed heads, combin- "ing the number of thread with the embossment, made before Mr. Conant's patent "was granted.* In relation to stamping or embossing the number of the thread "and the number of yards on each spool on the ends of the spools, we

"have always done so from the time we commenced manufacturing spool "cotton.

"Now, with these facts before me, I cannot see how Messrs. J. & P. Coats can "claim no one but their company has the right to manufacture spool cotton with "embossed spool heads. If there is anything in the combining of the number and "embossing in the embossed circle that they have a patent for, then, in that case, "we certainly would have no right to combine them; *but we certainly have the "right to emboss or stamp the number and length of yards on the spool heads, as we "always haved one;* and, so far as the number in combination is concerned, we cer- "tainly have the right to do it as *Mr. Merrick did it thirty years ago.* In conclu- "sion, allow me to say we have no wish or desire to benefit ourselves from the "reputation of J. & P. Coats, but propose to stand on our own reputation. We "will look into the matter at once, as we do not wish to do anything, in relation to "our spool cotton but what we have a perfect right to do.

"Yours very truly,

"L. R. HOPKINS,

Pres.

"P. S. I should have replied to this sooner, but was out of town when it came "to hand."

(Italics ours.)

This letter needs and deserves careful attention.

If Mr. Hopkins' statemint be true that he *designedly* made the embossing in his spool heads of a different pattern from that of the Coats' spools, it is clear that the difference is only in omitting the *cross lines.* These crossed lines or loops were *only* part of the style of ornamentation of the Coats' spools, and we have already indicated what we think his *design* was in introducing this *minor* change.

Mr. Hopkins claims that Mr. Merrick had made spool cotton with *embossed* heads long before the issue of the Conant Patent. But it appears that he was evading the issue, for he had seen only "embossed" *heads generally* and not heads with *embossed numerals*, and what *he* had done was to STAMP (not emboss) his spool heads with a single number, and had never *embossed.*

On the witness stand, on cross-examination, he shows clearly that he understands the difference between "stamping" and "embossing" (p. 365, x-Qs. 507–509, 513–515), and admits that they *first* used *embossed numerals* in 1878 or 1879 (p. 357, x-Q. 509; p. 400, x-Q. 927).

On the argument below it was claimed that they did not use embossed numerals during all the period from 1868 to 1878, al-

though they knew of them, *on account of their wish to respect Mr. Conant's Patent.*

But the letter does not seem to indicate that the omission to use embossed numerals was on account of any dread of or respect for the patent.

So far as here appears they did not know anything about the expiration of the patent, and so far as appears by this letter, also, their change of conduct in adopting the Coats appearance was not at all based upon the fact that they had ascertained that the patent had expired; they contended that their right to do what they had done was based upon the fact that they had *seen and bought spools with the numerals* upon the heads *before the patent*, and that *they, themselves, had done so thirty years before.*

Fifth. *The conduct of the defendants produced its natural and expected results.*

Persons acting for the Merrick Company, or trying to sell their thread, are proved to have recommended the Merrick thread on the ground that it could easily be sold for Coats' thread.

(1) *William E. Bowker* (pp. 49–54) testifies that he has dealt in thread and spool cotton for at least ten years, and bought and sold both Coats' and Merrick's 200-yard thread. That he was induced to buy the Merrick cotton because it was cheaper (Q. 9). That he bought it through William G. Pierce, on Washington street, Boston, and then he goes on to testify as follows (p. 51):

"14 Q. When you received the spool cotton in question, did Mr. Pierce de-
" liver it to you or did it come direct from the Merrick Thread Company? A. He
" did not deliver it to me; it was billed from the Merrick Spool Cotton Co.

"16 Q. At the time of negotiating this purchase of the Merrick thread, was
" anything said between you and Mr. Pierce in regard to the spool head, and labels,
" and their likeness to those of any other manufacturer, and, if so, what was said?
" A. I told him it looked very much like Coats', and he replied and said, "You
" can sell it half the time for Coats'." The same conversation also took place when
" buying from him again this summer.

"17 Q. What was there about the Merrick thread that made it look very much
" like Coats'? A. The formation of spool, the label and raised letters or figures;
" without very close scrutiny, one would be very apt to pick it up and sell it.

"20 Q. Please state in detail what your experience is, if any, in regard to the

" liability of people purchasing a spool cotton to be deceived into supposing the " Merrick Co.'s spools and thread are those of Coats? A. I have passed it out un- " intentionally, when in a hurry, waiting on customers, and having several other " customers to wait upon.

" 21 Q. Have you done this frequently? A. Quite.

" 30 Q. Has it ever happened in your business that any customers of yours have " purchased any of the Merrick spool cotton of you, and have afterwards made any " complaints about it, supposing it to have been Coats'; if so, what has occurred? " A. I had: one lady got a spool and returned it a few weeks ago, and wouldn't " have anything in place of it."

W. G. Pierce, the person referred to in Bowker's testimony, is called by defendants (pp. 556–576), and contradicts Bowker as regards saying to him that he could sell Merrick's for Coats', but Pierce admits that he called on Bowker to solicit an order for Merrick's Six-Cord Spool Cotton, and talked the matter over with him (Q. 15), and that he was frequently in Bowker's store and had had business relations with him. Pierce also testifies (Q. 55), in regard to statements made to him by Bowker, urging Pierce to come to New York and testify against the Merrick Company, and do all he could to injure them.

Bowker, recalled for complainants (pp. 251–256), in view of Pierce's evidence, testifies that Pierce did make the statements to him as originally testified to, and that Pierce never told him (referring to Bowker's New York testimony) that he (Bowker) had testified to an untruth, and denies that he urged Mr. Pierce to go to New York, and testify against the Merrick Company at all.

In connection with this testimony of Bowker in regard to Pierce, it is instructive to consider the testimony of P. J. O'Keefe, as follows:

(2) *P. J. O'Keefe* (pp. 103–106, 138) testifies that he has sold spool cotton for over ten years, dealt in the various kinds, including the Coats' and Merrick's, and buys Merrick's cheaper than Coats', and then goes on to testify in regard to this same W. G. Pierce, whose testimony we have considered above:

" Q. 28. Did you ever buy any Merrick spool cotton of any agent or com- " mission merchant? A. Yes; that is how I bought it; not by going to the house " directly.

" Q. 29. Through whom did you buy the Merrick spool cotton? A. Indirectly

" through W. G. Pierce, of Boston, and directly of an agent traveling for the Mer-
" rick Thread Company.

"Q. 30. Would you explain a little more fully what you mean? A. W. G.
" Pierce, of Boston, had sold Merrick thread at different times, and tried several
" times to sell me a hundred-dozen lot, saying that the cotton was so near like
" Coats' that customers would scarcely know the difference, and, also, that I would
" be making an extra ten per cent."

It is true that Mr. Pierce, when called as a witness for defendants, denies making any such statement to Mr. O'Keefe as that above set forth in O'Keefe's testimony, just as emphatically as he denied making the same statement to Bowker.

O'Keefe, when recalled for complainants (pp. 227–234) characterizes Pierce's statements (being answers to Qs. 21, 22 and 23 of his testimony), as follows (p. 228) :

"Q. 5. I refer you particularly to question and answers 21, 22 and 23 of
" Pierce's testimony, and, as far as those answers relate to you and Mr. Pierce,
" please state whether they are true or false? A. They are false."

And when asked :

"Q. 7. Do you know the reputation of William G. Pierce, of Boston, Mass., for
" truth and veracity? A. I do.

"Q. 8. What is it? A. Not reliable.

"Q. 9. Would you believe him under oath? A. I don't think I would?"

It is for the Court to decide whether the testimony of the two witnesses Bowker and O'Keefe, residing in different places and testifying at different times, in regard to statements made to them by Pierce, and which testimony they reiterate, pronouncing Pierce's statements false, is not more likely to be true, and does not carry greater weight of evidence than the testimony of Pierce himself, who confesses, on cross-examination, that he has come on from Boston to clear his reputation, and who admits every other circumstance in connection with trying to sell and extolling the Merrick goods, except the use of the language, that they could be sold for Coats, owing to their close resemblance.

O'Keefe relates another instance of deceit (p. 104) :

" 21 A. A little girl came into the store with a spool of Merrick's, without any
" cotton on, or any paper label on, and said, ' Give me a spool of Coats' cotton, like
" this,' presenting a spool which was Merrick's spool, with the raised number on ;
" the clerk passed her out a spool of Merrick's, of the same number and at the same
" price that a spool of Coats' would sell for.

" 22 Q. Any other instance? A. Yes ; when customers have called for Coat's

" cotton, Merrick's has been given them in place of it; that occurred quite fre-
" quently.

" 23 Q. Did you ever know of the substitution being noticed at the time? A.
" I don't remember a case."

(3) *Frederick Smith* (pp. 257–265):

This witness was examined on a commission granted upon motion by the Circuit Judge, and upon interrogatories and cross-interrogatories filed, the examination taking place at Burlington, Kansas.

His testimony is as follows (p. 261): That he has been employed as clerk and buyer since January, 1884, at Burlington, Kansas; has bought spool cotton since 1884, and has been accustomed to sell it since 1866, excepting two years, and is familiar with the labels and spool heads of the Coats' thread; has seen the Merrick spool cotton, and the Merrick spool heads and labels (Q. 7). He then testifies to the following fact (p. 261):

" EIGHTH. To the eighth interrogatory he saith:

" In the early part of the year 1886, but I cannot give the day or month, a
" man whose name I cannot give, but he was traveling for the Gilbert Silesia Manu-
" facturing Company, called on me at Burlington, Kansas, and desired to sell, and
" offered to sell me, the Merrick thread. He said and represented that it was very
" similar to and much like the Coats' spool thread, and similar to the spools and
" labels of the Coats' make, and so similar to the Coats' thread that the difference
" was not easily discovered; that is, that the spools and labels were so similar to
" those of the Coats' make."

" NINTH. To the ninth interrogatory he saith:

" He did represent himself as the agent, and his statements were as given in
" answer eighth.

" TENTH. To the tenth interrogatory he saith:

" It was offered at a less rate, and I think about nine or ten per cent. less.

" ELEVENTH. To the eleventh interrogatory he saith:

" The inducement was that we could have it for less, and, as the spools and
" labels were so nearly alike, very few people could detect the difference, and we
" could make a better profit thereon.

" TWELFTH. To the twelfth interrogatory he saith:

" He did point out the similarity between the spool and labels of each make,
" as I have before stated.

" FOURTEENTH. To the fourteenth interrogatory he saith:

" The person spoken of had with him Merrick spools, and exhibited them in
" comparison with Coats' spools which I had, in my presence, and remarked upon
" their similarity, and the possibility of passing one for the other, as I have stated.

" FIFTEENTH. To the fifteenth interrogatory he saith:

" He desired me to purchase, and remarked upon the similarity, and he made
" the statements I have already repeated."

The witness cannot give the name or address of the person who called on him, and he did not buy any Merrick thread. The only answer to this testimony attempted by the defendants is the statement of Mr. Hopkins, that he cannot find that any of his agents were in Burlington at that time, though he admits they were traveling in that section of the country, and may have been near there.

(4) *Henry A. Young*, a member of a drygoods firm in Lake City, Minnesota, testifies (p. 269):

"11 Q. Have you within the last six months, had any solicitations to buy or "handle in your business said Merrick's thread? A. Yes; an agent called upon us "last fall from the Merrick Thread Company, and he spoke to both Mr. Chas. H. "Koch and myself, asking us to buy said Merrick's thread.

"12 Q. What, if any, representations were made to you by that agent? A. I "did not hear all that he said to my partner, Mr. Koch, as I was busy, but he "highly recommended the Merrick thread and urged us to handle it; then I left "him talking with my partner Mr. Koch; this was at our store, in Lake City."

(5) *Charles A. Koch*, Mr. Young's partner, to whom he refers in his testimony, says (p. 280):

"11 Q. Did an agent of the Merrick Thread Company call upon you at any "time lately or within the last six months? A. There has one so called.

"12 Q. State what, if any, representations were made to you by that agent. A. "He came up and handed me his card. He wanted to sell me some Merrick thread. "I told him that we were the agents of Auchincloss Bros. for the Coats' thread in "this town, and that we could use no other. I said to him, furthermore, that it "was about all that we could do to sell two thousand (2,000) dozen a year. He "said he understood that we sold more than that. I think Mr. Young may have "said something of that kind. I looked at our books and found that we had sold a "few dozen more than required, but told him that we could not afford to try to "introduce another thread. He made a statement to the effect (I can't recall "the exact words) that we could use the Merrick thread together with the Coats,' "there not being much difference in the label and appearance of the spools, but I "told him that wouldn't sell the Coats' thread for us. That is about all that was "said, only I told him two or three times we couldn't use another thread. I told "him that we couldn't afford to introduce another thread—I mean we couldn't "take the time to introduce a new brand.

"13 Q. Was anything said to the effect that you could sell the Merrick for the "Coats' thread sometimes? A. Nothing more than that the appearance of the "spools being so near alike we could sell the one for the other.

"14 Q. When and where did this conversation take place? A. I can't give "the time—that is, the date—except that it took place some time last fall, and "within six months, and at the office or store of C. F. Young & Brother, in Lake "City, Minn."

Harry Phillips (pp. 690 to 700), the salesman of the Merrick Company referred to by Young and Koch, was called by the defendants to contradict their testimony, as we have stated above, in reference to another point in our brief. He remembers the interview well (Q. 2), and describes the various incidents. Of course, he denies having said what both Young and Koch have sworn he did say, and denies that he has ever made any reference to the similarity or dissimilarity of the Coats' and Merrick's spools or labels; but he admits that he urged them to buy a stock of Merrick thread, and even admits that he "might have said something to that effect"—viz., that they could use the Merrick thread together with the Coats (p. 696, x-Q. 72). We submit that there is every probability that he did make the statement, as testified to by the complainants' two witnesses.

(6) *John B. Crosby* (pp. 130–135) testifies that he is the buyer and manager of the notion department of Root, Strong & Company, of Detroit, Michigan, and has had twenty-two years' experience in buying and selling spool cotton; that his firm has dealt in Coats' thread for at least eight years, and began to deal in Merrick's two or three years ago; and that he was their traveling salesman at that time, and first met Merrick's thread at Shelby, Michigan, with the firm of Paton & Andrus. He then says (p. 131):

"11 Q. Did you have any conversation with a member of that firm at that period "in regard to the Merrick thread and their dealing in it; and, if so, what was said? "A. I asked them why they put in new thread or Merrick's thread. They said, be- "cause it was a good deal cheaper, and that it looked so much like Coats' that "their customers would not notice the difference.

"12 Q. On this same trip—on which trip you say you first met with Merrick's "thread—did you make inquiries of any other dealers about it, and why they "introduced it; and, if so what reasons were given? A. Yes, sir; the same reasons "were given."

"13 Q. State whether you remember the trip distinctly for any special reason? "A. Yes, sir; I remember it, because it was there I first met with Merrick's thread "—the first I heard of it."

And he says (Q. 17) that his firm have made sales of Merrick's thread to a considerable extent to customers who had formerly bought Coats' thread of them.

Messrs Paton & Andrus are called by defendants (pp. 704-713), and testify to the effect that they have no recollection of having made such statement as Mr. Crosby testifies to to him, but their testimony shows that the witness, Crosby, was in their store on business at the time he testifies to, and selling spool cotton, and that they were just introducing Merrick's thread at that time.

All Paton's testimony amounts to is that he does not remember that he ever made such a statement to Mr. Crosby, though he admits that he may have talked about Merrick's thread the first time Crosby saw it there, but he doesn't remember (p. 707, Q. 33); and he virtually admits that the Merrick spools have a closer resemblance to Coats' than any other spools.

"37 x-Q. How is it among the spools that you have seen? A. It may have a somewhat closer resemblance than some others."

His testimony is simply to the effect:

"I don't remember saying anything to him about it (x-Q. 40)."

The same is true of the witness Andrus, who can simply say, "I believe not" (Q. 4), but he cannot remember what was said by Crosby or himself on the first occasion Crosby was in, after the Merrick thread was put in (x-Q. 13).

He makes some significant admissions (p. 711):

"29 x-Q. Do not the Merrick's spools, in your opinion, bear a close resemblance "to the Coats' spools; I refer particularly to the ends which have the raised num- "bers on them? A. I think they do.

"30 x-Q. Suppose the customers could not read, or *did not* read, the name on "the label, would they not be liable to mistake Coats' spools for Merrick's, or "Merrick's for Coats'? A. I think, if they would observe the spools *closely*, they "would see a difference, although such mistakes *might* occur."

It is for the Court to decide whether the positive statement of Mr. Crosby, who fixes his recollection by the fact that this was the first time that he had seen this new thread, or Merrick thread, on sale, as to what was said about it on that occasion, is not entitled to greater weight than the statements of Messrs. Paton & Andrus, who can say nothing more than that they have no recollection of making such statements.

(7) *Walter Miller* (pp. 180–189) testifies that he is a salesman for George A. Clark & Bro., manufacturers of the "O. N. T." spool cotton, and has been familiar with various brands on the market; that Merrick is the make of spool cotton which bears the closest resemblance to Coats as to spools and labels, and he believes that it is close enough to deceive an ordinary customer; and he testifies (p. 181):

"Q. 10. Can you mention any case in which the question of similarity be-
"tween Coats' and Merrick's spools came up in your dealing with any retailer;
"and, if so, give his name, and state where and when it was, and what was the oc-
"currence? A. Yes, sir; Henry Cumming, of Washington, New Jersey, told me
"that he thought he could sell Merrick's thread in the place of Coats' because
"the spools looked so much alike. This happened about a year ago. He had
"at that time put in Merrick's thread in place of Coats'.

"11 Q. Where did this conversation with Henry Cumming occur? A. In his
"store."

Henry Cumming, called by defendants (pp. 618–623), admits that he put some Merrick thread in stock at about the time testified to by Mr. Miller, but when asked whether he made the statement testified to by Miller, as quoted just above, says as usual with defendants' witnesses, "I have no recollection of any such thing." But he will not deny that Walter Miller has been in his store and may have been there at the time testified to; nor that he may have talked with Miller at his store about the different brands of thread, and about Coats' as compared with Merrick's. All he will say is, "I don't reremember it" (p. 621, x-Q. 48).

He also testifies:

"Q. 60. Do not the Merrick spools and labels bear a very close resemblance to
"the Coats', to a person looking at them hastily or not reading the printing on
"them? A. I think they do.

"Q. 61. They both have the raised numbers around the edge of the spool;
"do they not? A. Yes.

"Q. 62. And no other spools have these, so far as you know, do they? A.
"Not that I know of; no."

(8) *Leroy B. Cox* (pp. 189–204) testifies that he is a traveling agent for Thomas Russell & Co., sole agent for Clark's Mile End spool cotton, and has been with them for fourteen years, and handling spool cotton ever since 1865, selling to jobbers and to large and

small retail dealers. He has been over nearly the whole Northwest (Q. 3), and in his territory Coats' is the leading brand (Q. 4).

He testifies (p. 190):

"6 Q. Which make of spool cotton, in your experience, bears the closest re-
" semblance to Coats' cotton in the appearance of its labels and spools? A. Mer-
" rick's, in spools; it would be difficult to find many merchants who would detect
" it in their thread—the twist of threads.

"7 Q. Is the resemblance between the Coats' and Merrick's spools such as, in
" your opinion, is calculated to deceive an ordinary purchaser who was exercising
" no very special care? A. Emphatically so.

"8 Q. Do you remember about when the Merrick thread, in its present appear-
" ance of spools, first came under your observation in the territory you cover.
" A. About three years and a half or four years ago, I think.

"9 Q. Do you remember something being said in the trade, at that time or since,
" in regard to the similarity of Coats' and Merrick's spools, and if so, what? A. Yes,
" sir, it was quite generally stated among the trade, that they could sell Merrick's
" spool cotton as well as Coats', mainly on account of the spool being similar, also
" on account of its being cheaper.

"10 Q. Were such statements, as above detailed, made to you? A. Yes, sir.

"11 Q. And by what class of dealers? A. Retail dealers, principally the
" smaller class.

"12 Q. By retail dealers, do you mean those who sold directly to consumers in
" quantities as small, as, sometimes, a few spools? A. That's what I mean.

"13 Q. State whether this statement that you have referred to in your ninth
" question was made to you at different places in your territory? A. Yes, sir."

In connection with the testimony of the above witnesses, some remarks of Lord Chancellor HATHERLY, in *Wotherspoon vs. Currie*, from which we have already made quotations, are of interest. He says (p. 517):

"There is abundant evidence that when *Glenfield starch* is asked for in retail
" shops, the respondent's goods are sold as *Glenfield starch*, which is the designa-
" tion and characteristic of the appellant's goods. It has been long ago pointed
" out in decided cases that it is not upon a *mala mens* towards the first purchaser
" that the decisions of these cases rest. The first puschaser buys the goods
" cheaper for the very purpose of being able to sell them as Glenfield starch, the
" means of so doing being put in his hands by his being furnished with goods with
" this label, I will not say in order that he may deceive, but it is a necessary conse-
" quence that he is enabled to deceive others by this means. There is evidence that
" this is an article sold by retail at the same price as the appellant's goods, although
" it is bought at a less price from the respondent in order that it may be so sold.
" That is just the very case of all others in which the Court has constantly inter-
" fered to prevent that which is a distinct fraud."

Sixth. *The confusion and deception made possible and probable by the defendants' fraudulent simulation of the appearance of the Coats' goods has, in fact, occurred, and the defendants have reaped thereby the profits they had calculated upon.*

The defendants called a number of witnesses, and after laying two spools side by side before them and pointing out the Coats' name on one and the Merrick name on the other, asked them to say whether they would ever mistake them or accept a spool of Merrick thread in the belief that they were getting a spool of Coats'. Of course they could not then mistake them. No one could. The bare question of similarity or dissimilarity would put any witness on his guard, and once his suspicion aroused, he could not afterwards be deceived. The closer the resemblance, the more critical his examination.

Such testimony, and the defendants' record is largely made up of such, is wholly immaterial to the question. All this may be true, and the fact still remain, that the Merrick Company have made their label in general imitation of the appearance of the Coats' label, and have surrounded this label with an embossed peripheral band of natural colored wood, they have done an act which, as evident to the senses, causes their goods to pass current, when scrutiny is not given, as the goods of the Messrs. Coats. So long as it is a fact that the Merrick Company have done this thing, the charge which the complainants make of the simulation of their trade-mark is established by the evidence which an ocular inspection furnishes.

On the other hand, the mere opinions of witnesses that the resemblance is liable to deceive may be entitled to no more consideration than the opinion of those who think it is not liable to deceive. But there is a kind of testimony which is of value. Evidence that purchasers have, in fact, actually been deceived by the simulation is, *a fortiori*, evidence that the simulation is *calculated to deceive.*

The complainants produced a number of witnesses who testified that the general resemblance of the Merrick spools to the Coats spools made it very likely that the one would be taken for the other, and that it was calculated to deceive purchasers. To this effect is the testimony of Mr. Ives, the general agent of the Willimantic Linen Company (p. 107, Qs. 18–22), of Mr. Russell, the selling agent of Clark's Mile-End Spool Cotton Company (p. 120, Qs. 17–24), of A. S. March (p. 118, Q. 4), and of a great number of other witnesses.

But we shall refer now only to the testi mony of those witnesses who have testified to specific instances, in their own experience, where the Merrick thread had actually been passed off as and for that of the Messrs. Coats.

We shall refer to the testimony of these witnesses in regular order:

(1) *Christopher D. Beale* (pp. 27 to 30) testifies as follows (p. 28):

"12 Q. When was your attention first called particularly to the Merrick Thread "Company's spool cotton? A. I have known the Merrick spool cotton for a num- "ber of years. My attention was especially called to it on the 2d of February, "1884.

"13 Q. Where was this? A. Keokuk, Iowa.

"14 Q. Please state what occurred at the time and place mentioned by you, "which called your attention specially to the matter? A. I was in a retail dry- "goods store, talking with the proprietor upon the different merits of the spool cottons "He drew my attention to the label upon the end of the Merrick spool cotton, say- "ing at the time, it was a very easy matter to substitute it for Coats' cotton. To "prove what he had said, in my presence, he sold a lady four spools of cotton. "She wanted Coats'. He put in one spool of Coats', three spools of Merrick. At "that time, the deception was not discovered. I asked him if he did not think it "would be returned. He said, no, as he had often done so before. The only "object he had in substituting Merrick for Coats', at that time, was to show "how easily the customer could be deceived.

"15 Q. Did you call this matter to the attention of your principals at that "time? A. About ten days after.

"21 Q. Please state what your own experience has been in regard to the diffi- "culty of distinguishing the said spools of the said two manufacturers? A. The "difficulty that I had was in the same place, at Keokuk. Being a little near- "sighted, it became difficult for me to distinghish in the cabinet where they kept "their cotton the difference between Coats' and Merrick with the light they had "in their store."

The store in which Mr. Beale had this experience was that of William Weismann & Co. Weismann was thereafter called by the

defendants, and he denies that any such occurrence took place as Mr. Beale has narrated; but on cross-examination, admits that Mr. Beale was frequently in his store; that he was there in the year 1884, and may have been there in February, 1884. That he, Weismann, was selling both Coats' thread and Merrick's thread in February, 1884, and kept both Coats' thread and Merrick's thread in a Merrick cabinet in the central part of the store, which was lighted only at the front and back (pp. 595 and 596.) And Mr. Weismann will not deny that Beale talked to him about spool cotton in February, 1884 (x-Q. 76). He says that he undoubtedly did say something about Merrick's cotton (x-Q. 77). He will not even say that the similarity of Coats' and Merrick's labels was not discussed by him and Mr. Beale in February, 1884 (x-Q. 78); but has never thought of the thing from then until the time he gave his testimony, October 13, 1887. Whereas the testimony of Mr. Beale, just quoted, was given on July 2d, 1884, or just five months after the occurrence he narrated, while Weismann's testimony is given over three years and a half from the date of the alleged occurrence. Mr. Weismann will not even say that he did not sell spool cotton to a woman in Beale's presence at the time alleged, or whose make of cotton he did sell, if he did make such sale (x-Qs. 89, 90). He admits that he makes a larger profit by selling Merrick's than Coats' (x-Q. 102). Also that he had the different kinds of threads mixed in his cabinet (x-Q. 111).

Mr. Beale is recalled after Weismann has given his testimony (pp. 142–145), and, being asked to testify in view of Weismann's denial of the facts Beale formerly stated, reiterates his testimony and denies the truth of Weismann's statement, and produces a written record from his book, made by him, which proves that on February 2d, 1884, he was at Keokuk, Iowa, and called at the store of W. Weismann & Company, and noticed a Merrick cabinet there; and he testifies that he remembers the occurrence distinctly, because he had never seen an embossed number on a Merrick spool before he saw it there (Q. 11). And on February 10, 1884, he wrote a letter to Messrs. Auch-

incloss Brothers, his principals (printed p. 144), containing the statement, "I see Merrick's spool has the numbers the same as Coats'. Have they a right to that spool?" showing that his attention had been particularly called to these raised numbers at that time.

The entry in Beale's book is offered as "Complainant's Exhibit Weismann entry," and the letter of February 10th, 1884, as "Complainants' Exhibit Letter of February 10, 1884."

On the whole testimony of these two witnesses, and in view of the fact that Mr. Beale is supported by the written entries and letter produced, whereas Weismann's denial is perfunctory and indefinite as to all details, it is submitted that the statement made by Beale originally quoted has been satisfactorily proved.

(2) *Frank M. Smith* (pp. 33 to 42) testifies that he resides at Providence, Rhode Island, and had both Merrick's and Coats' thread in stock (Q. 15), and, in regard to the liability of mistaking the Merrick for the Coats spools, says (Q. 20, p. 35):

"A. I have given, unintentionally, Merrick's thread for Coats'. The way I "found it out was by the customer returning Merrick's thread and reminding me "of the mistake.

"21 Q. Did the customer inquire for Coats' thread at the time of purchase? "A. They did.

"22 Q. Did you, yourself, make the mistake of delivering Merrick thread for "the Coats? A. I did.

"25 Q. When you had inquiries for Coats' thread, and had not had the num- "bers desired, have you ever filled orders with corresponding numbers of Merrick "thread? A. Frequently.

"26 Q. Have any of the customers ever detected the fact that Merrick thread "had been given them instead of Coats', as far as you know? A. Only once, to my "recollection.

"27 Q. Now, what is your opinion as to the probability of ordinary retail cus- "tomers being deceived by the similarity of the spool heads and labels, into think- "ing that the Merrick thread is the Coats'? A. Well, I can only speak for myself "in regard to that, that, probably, nine times out of ten, being in a hurry, I would "be as liable to take one for another as the same thread, unless I took particular "notice.

"93 Re-d. Q. (p. 41). Is there anything in the style of the label or spool head, "or both, which you recognized, as distinguishing Coats' thread? A. Well, it is "merely the effect and size of the label, and there are several things that I might "not explain. I can almost distinguish it from any amount of thread there is, I "will say with the exception of that" (pointing out Merrick's).

(3) *Joseph Belfield* (pp. 42 to 45) testifies to an instance of mistaking Merrick's for Coats', as follows:

"Q. 6. When did you first see one of them (referring to the Merrick Thread "Company spool)? A. As near as I can remember it was in the spring of 1883.

"7 Q. Please state who showed it to you then, and what occurred at the time? "A. It was shown to me by Mr. James Coats, one of the complainants. Mr. Coats told "me that he had some of the Merrick's 200 yards spool, and that, if I would go with "him to his office he would show them to me. On opening his desk, he took two "spools of thread from some samples, and in handing them to me, I thought they "were J. & P. Coats. I told him that it was Merrick's spools that he was going to "show me. He looked at the spools, and said those were Merrick's. As soon as I "got them in my own hands, I saw they were Merrick's."

(4) *William E. Bowker* (49 to 54) testifies that he is a dealer in dry and fancy goods in Hanover street, Boston. He says (p. 51):

"20 Q. Please state in detail what your experience is, if any, in regard to the "liability of people purchasing a spool of cotton, to be deceived into suppos- "ing Merrick Company's spools and thread are those of Coats'? A. I have passed "it out unintentionally when in a hurry waiting on customers and having several "other customers to wait upon.

"21 Q. Have you done this frequently? A. Quite.

"22 Q. Have you, in these instances, shown these spools to the customers in the "store at the time of sale? A. I have picked it up and laid it on the showcase "while picking up a piece of paper to wrap it up again where the customer stood.

"23 Q. How has your error in regard to the thread become known to you, if at all? "A. By being returned. Some before being used, and some the empty spool.

"24 Q. How often has this been done? A. I could not say just how many "times.

"25 Q. About how many times? A. I could not say; but I should think as much as a half a dozen, any way; maybe more.

"30 Q. Has it ever happened in your business that any customers of yours, "have purchased any of the Merrick spool cotton of you, and have afterwards made "any complaints about it, supposing it to have been Coats'. If so, what has oc- "curred? A. I had. One lady got a spool, and returned it a few weeks ago, and "wouldn't have anything in place of it.

(5) *Herbert R. Taft* (pp. 56 to 61) testifies to having been familiar with Coats' cotton for a number of years, and that he thinks the similarity between Merrick's and Coats' spools would be calculated to deceive an ordinary customer, and gives the following instance of deceit:

"10 Q. Have you known of any actual instance of the kind; if so, please "state the circumstances? A. I met one instance of that sort; while in the store "of Freeman, Haley & Morton, Columbus, Ohio, talking to Mr. L. C. Freeman, a

" lady whom I am intimately acquainted with, Mrs. George Butler by name, know-
" ing that I was selling J. & P. Coats' spool cotton, said that she had bought some
" of it in that store a few days previous, and was surprised to find that it was not as
" good as it formerly had been; knowing that this firm sold Merrick's thread, and did
" not sell Coats', I told her she was mistaken in the kind she got, and I got a spool
" of Merrick's from their cabinet, which, after looking at, she admitted was the
" sort she had purchased."

(6) *Loring Sears* (pp. 95 to 102) testifies that he has dealt in spool cotton for thirteen years, of the various leading kinds, including Coats' and Merrick's; that he buys Merrick's ten per cent. less than Coats' (Q. 12), and testifies as follows (p. 96):

" 13 Q. Have you had any knowledge, in the course of your dealing in these
" two makes of spool cotton, of the Merrick spool cotton being mistaken for Coats'
" spool cotton by retail purchasers? A. Only twice, I think.

" 14 Q. Please state those cases? A. One was returned to one of my clerks;
" one was returned to myself—stating they wished machine cotton, and what I
" gave them was basting cotton.

" 15 Q. Did you give any instructions in your store to your clerks as to what
" spool cotton was to be sold on inquiry from customers? A. My instructions
" were, if Coats' were called for, and we were out of the number, to substitute
" Merrick's.

" 16 Q. Has that frequently been done? A. It has.

" 17 Q. Did you ever know of the substitution being observed or noticed at the
" time? A. No, sir.

" 18 Q. And do I understand you to mean that the two instances that you
" referred to in the previous answer were the only instances where the substitution
" was called to your attention by the purchasers afterwards? A. Yes.

" 19 Q. Why did you put in Merrick's thread on orders or requests for Coats'?
" A. Because I made more profit on Merrick's.

" 21 Q. Why didn't you put in Kerr's thread, for instance, when you did not
" have the required number of Coats'? A. Because they would readily notice it
" from the shape of the spool."

He also testifies (p. 97), in regard to a traveling agent of Coats', named Hazlewood, being deceived by the similarity of the Merrick spool heads and labels to these of Coats'.

" 30 Q. State what occurred at the time? A. He opened the case and took
" out a spool of black cotton and said he did not think it looked as well as their
" cotton ordinarily, not being such a good color or shade; and I called his atten-
" tion to its being Merrick's.

" 31 Q. And was it, in fact, a spool of Merrick's that he had taken up and criti-
" cised? A. It was.

" 32 Q. Did he suppose it was Coats' when he took it up? A. I should say
" from the manner he took it out of the case that he did.

" 33 Q. Did he say anything about having so supposed at the time? A. He
" spoke as being surprised that he should be mistaken himself."

He also says (p. 99):

"51 Q. Do you observe the number of the thread on the wood of both the "Coats' and the Merrick spool; if so, please state what you understand is the object "of that? A. I notice the number, and have always supposed it to be a sort of "trade-mark on the Coats' spool, not knowing any other spool cotton to be "numbered in that way previous to the introduction of Merrick's, or any other "since."

And (p. 102):

"94 Re-d. Q. Did you ever substitute either of the Clark threads or the Wil- "liamantic thread when Coats' was ordered? A. No, sir."

(7) *P. Joseph O'Keefe* (pp. 103 to 106) is a dry-goods dealer at Worcester, Mass. He testifies to instances where Merrick spool cotton has been mistaken for that of Coats in his own trade as follows (p. 104):

"21 Q. Please give some instances? A. A little girl came into the store with "a spool of Merrick's, without any cotton on or any paper label on, and said, "'Give me a spool of Coats' cotton like this,' presenting a spool which was "Merrick's spool, with the raised numbers on; the clerk passed her out a spool of "Merrick's of this same number, and at the same price that a spool of Coats' "would sell for.

"22 Q. Any other instances? A. Yes; when customers have called for Coats' "cotton, Merrick's has been given them in place of it. That occurred quite fre- "quently."

(8) *Frank E. Stacy* (pp. 113 to 117) testifies that he is a dealer in fancy goods, and has sold Coats' thread for eight years, and Merrick's for eighteen months. He testifies as follows (p. 114):

"15 Q. Please state whether, in your experience in dealing in spool cotton, "you have had any difficulty in distinguishing between any or either of the brands "of spool cotton in which you deal; and, if so, between which? A. I have; "between Coats' and Merrick's.

"16 Q. Please state what, in your experience, occasions the difficulty in dis- "tinguishing between those two brands? A. The embossed numbers on the head "of the spool, the color and general appearance of the label.

"17 Q. In your dealings in spool cotton, have you yourself ever mistaken the "spools of one thread for the other? A. I have.

"18 Q. Have you ever had any difficulty in distinguishing between the spools "and labels of any of the other makes of thread in which you have dealt, or have "you ever mistaken any of the other spools than Merrick's for Coats'? A. I have "not."

And he says, in answer to Q. 19:

"I think the threads can very easily—very—can hardly tell one from the other "—impossible to tell one from the other.

"20 A. Customers who are acquainted with Coats' thread tell it by the "embossed numbers on the head, and, unless they read the labels, they could very "easily mistake one for the other."

(9) *Albert R. Logie* (pp. 135 to 142) has been a salesman for Root, Strong & Co., of Detroit, and has been familiar with the different brands of spool cotton for twenty years. He testifies that Coats' thread is the best, in his opinion; also (Q. 7) that he made the first purchase of Merrick's thread for Root, Strong & Co. He states that the Merrick spools bear the closest resemblance to the Coats' in labels and appearance (Q. 10), and that the resemblance is such that, in his opinion, retailers could substitute Merrick's for Coats' without being readily detected (Q. 12).

When asked if the similarity of Merrick's labels to Coats' has made the Merrick thread more salable than if its labels were entirely dissimilar (Q. 13, p. 136), he answers:

"I believe so; and I certainly would buy Merrick's, because of its similarity "to Coats', in preference to a thread equally as good, at the same price as Merrick's, "but with very distinctive boxes and labels.

"14 Q. For what reason would you do this? A. Because I believe that the "similarity of label is a value to it as a selling quality. I refer particularly to the "trade of Michigan, with which I am familiar.

* * * * * * * * * *

"32 Q. In what respect do you think the Merrick label resembles the Coats? "A. In such a general resemblance that it makes it difficult to particularize—diffi-"cult for me to particularize, at least.

"33 Q. In what respects does the Merrick label resemble the Coats in which the "George Clark label and the Willimantic label do not resemble the Coats? A. The "label, lettering and general resemblance of the Merrick, at a short distance, may "be readily mistaken for the Coats; whereas, either of the others mentioned are "readily distinguished from the Coats. I speak now of the inexperienced eye.

* * * * * * * * * *

"67 Q. Is Orrs & McNaught thread one of the different brands of spool cotton "that you have known, or heard about, in the trade? A. I have heard of it; "have never seen it, and do not consider it of importance to the jobbing interest at "the present time. I refer to Michigan.

"68 Q. In speaking of the Merrick spools and labels as being similar to the "Coats, did you mean the labels on the spools as well as on the boxes; I refer par-"ticularly to questions 11, 12, 13 and 14? A. I refer to the thread as being similar "in spool, box, labeling, color and each point that goes to make up similarity."

(10) *Mrs. Sarah E. Hornblower* (pp. 151 to 157).

This lady, at the request of one of the firm of Auchincloss Bros., agents for J. & P. Coats in this city, visited various stores in New York for the purpose of seeing whether, when she asked for Coats' cotton, she would perhaps obtain Merrick's, and she states that at No. 182 Third avenue, on Tuesday, December 6th, she did receive Merrick's for Coats', as follows:

"7 Q. State what you asked for; describe the person who served you, and the "manner in which the purchase was made of the spool cotton you refer to? A. I "asked for Coats' cotton; I was served by a boy of about eighteen; he picked me "out the numbers I asked for, 60, 80 and 40. He wrapped them in paper and gave "them to me. I put them in my ulster pocket, and opened the parcel after I "reached home.

"10 Q. Will you produce these spools you bought on that occasion? A. I do "so. They are three spools—No. 40 of the Merrick Thread Co., Nos. 60 and 80 of "J. & P. Coats."

(These three spools were offered in evidence as "Hornblower Spools 1, 2, 3").

And she states that they have been in her possession ever since, and are the same spools that she bought at that place.

The result of this experiment thus fully justified the making of it, and proved that a person asking for Coats' was liable to receive Merrick's, in small retail stores; the fair inference being, owing to the similarity between the spools, that the confusion in filling the order was due to resemblance in these spools.

Defendants, in answer to Mrs. Hornblower, called Morris Abrahams and Leopold Abrahams (pp. 608 to 617).

Morris Abrahams is a boy of about eighteen, and evidently the person whom Mrs. Hornblower testified she bought the thread from. He states, in a general way, that he never sold any Coats' spool thread, because they had never kept it at their store; but the cross-examination shows that he was selling thread at the store No. 182 Third avenue, at the period when this lady testifies she called there; he could not remember what he sold or whom he sold to on the 6th of December, 1887, the day referred to.

It also appears that the various kinds of threads on sale are

kept in a single cabinet, and that Merrick's thread was on sale at the time Mrs. Hornblower called.

L. Abrahams, his father, while saying that he does not now sell Coats' thread, admits that he used to buy it; he cannot remember for how many years he did, nor can he remember to whom he last sold Coats' thread, or when it was last sold in his store (p. 616, Q. 29 and Q. 30), and that he may have spools in stock that he has had a long time (Q. 47).

He has nothing that will show his last purchase of Coats' cotton (Q. 56).

It is submitted that the direct testimony of an intelligent lady, who went out with the full understanding of what she was to do, and the express purpose of preserving the recollection of it and the things she bought, so as to testify about them, is entitled to more weight than the testimony of the witnesses called in reply, who simply say that they could not have done a thing, but admit that they have no specific recollection as to the particular incident.

(11) *Pierre V. Root* (pp. 204 to 208) is by occupation a salesman for the Willimantic Thread Company, covering the City of Chicago and a portion of the State of Illinois. He testifies that Coats' thread is the leading thread in his market, and that Merrick's, in the appearance of its spools and labels, bears the closest resemblance to Coats', and that this resemblance is calculated to deceive customers (Qs. 9 and 10), and also as follows (p. 205):

"11 Q. Can you mention any instance in your experience where a purchaser "was so deceived, and obtained Merrick's instead of Coats'; and, if so, state that "instance? A. I can. I have one instance in my mind—that of Mrs. Partridge, "of 228 South Hoyne street, Chicago. As well as I can recollect, it was about a year "ago. She inquired in a store for Willimantic thread, and the dealer told her that "he didn't carry it, so she asked for a spool of Coats'; he gave her a spool of "Merrick's, which she didn't notice at the time, but afterwards discovered that it "was another thread—that it was Merrick's thread.

"12 Q. State whether she showed you this spool of Merrick's thread, so given "her for Coats'? A. She did."

He also mentions a statement made to him by one O. C. Fischer, of 161 North avenue, Chicago, as follows:

"15 Q. What was his statement to you, or the substance of it, as you remem-
"ber? A. He said he was going to try and sell Merrick's thread, as there was
"more money in it.

"16 Q. And in regard to the similarity to Coats', what was his statement? A.
"Said he thought he could sell it as well as Coats', because he didn't think people
"generally could tell it from Coats' (now, I'm taking this all from memory)."

The defendants, in answer to Mr. Root's testimony, called *O. C. Fischer*, to whom he referred, who, in the usual style, denies ever having had a conversation with any person regarding the similarity or dissimilarity of the Merrick and Coats' spools, or saying that he could sell Merrick's for Coats'.

Fischer admits, on cross-examination, that Root had been in the habit of coming into his store and talking to him about thread, and trying to persuade him to buy the Willimantic thread, and that he had been in his store at least fifty times in the last few years (p. 637).

The witness makes some other significant admissions. Thus (p. 638):

"x-Q. 71. Do not Merrick's spool heads, now you have seen them, bear a
"closer resemblance to Coats' than any other spool heads? A. Yes.

"x-Q. 69. Is there not a great similarity in the fact that both have the
"raised numbers around the label on the spool head? A. There is such a resem-
"blance.

"70 x-Q. No other spool that you know of, except Merrick's and Coats',
"have that point of resemblance, the raised numerals on the spool heads, have
"they? A. No, sir.

"75 x-Q. What is the best-known thread in this market? A. Coats'."

The evidence of Fischer shows that he has been visited and talked to frequently by the agents of the defendants. Of its truth, the Court must judge.

Mr. Root himself has also been summoned by the defendants, and their methods adopted with him are very significant, as showing the methods they have used in procuring testimony in this case. It appears from his evidence (pp. 653 to 660) that the Mrs. Partridge whom he mentioned as having been deceived, when he testified for complainants, was quite ill, and expected to be confined, and the defendants' agents seem to have made use of this, and of his fear that she should be summoned and compelled to testify as a witness, in her

condition, and have tried to get him to take back the testimony he gave in New York. Their agents saw him on a number of occasions, and procured from him an affidavit, without his consulting in any way with complainants' counsel, or mentioning the fact, until he appeared as a witness on the part of defendants at Chicago. Under the pressure put upon him, he says that he concludes he has been mistaken in regard to the evidence he gave about Mrs. Partridge and Mr. Fisher.

We believe that a careful reading of his testimony, both for complainants and defendants, and consideration of the way in which he was approached and his testimony was taken by defendants, will lead the Court to the conclusion set forth above, that he has been coerced into taking back his original testimony, so far as he has done so.

(12) *Mrs. Cornelia E. Brown and Annie Miller* (pp. 235 to 251). These witnesses were instructed by the agents of J. & P. Coats in the same manner as the witness, Mrs. Sarah Hornblower, above referred to, to go to various retail stores in the City of Chicago, where they lived, and ask simply for Coats' thread, and take what they received without comment, and preserve these spools so bought, and be able to testify as to what they had obtained, and the circumstances. In pursuance of these instructions, as their testimony, taken in Chicago, shows, they did visit retail stores, with the following results (p. 236):

Testimony of Cornelia E. Brown:

"Int. 4. State what spool cotton you asked for on those occasions? A. I asked "for No. 30 'Coats'.'

"Int. 5. State whether, having asked for Coats' cotton, you received any other "make of cotton? A. I did.

"Int. 6. When and where? A. It was between the 12th and 18th of December "last, at No. 913 Clybourne avenue, Chicago.

"Int. 7. State what you asked for, who served you and the manner in which "the purchase was made of the spool cotton referred to? A. I asked for No. 30 "Coats' cotton. A saleslady served me. She went a few steps, wrapped up the "cotton spools, received the pay without showing them to us, and handed them to "be wrapped up. We examined them immediately upon leaving the store, and "found that the cotton spools were Merrick's instead of 'Coats'.'

"Int. 10. Will you produce the spools bought by you on that occasion? A. I "do so. They are two spools No. 30 of the Merrick Thread Company."

These were the spools marked "Complainants' Exhibit Brown Spools 1 and 2."

She also received Merrick's spools on asking for Coats, at No. 310 West Polk street, Chicago, and No. 1662 Milwaukee avenue, Chicago, buying two spools at each of the above mentioned places, which were offered in evidence as "Complainants' Exhibits Browns Spools Nos. 3, 4, 5 and 6."

Annie Miller was with her on all these occasions as a witness.

The witness, *Annie Miller*, testifies in regard to the transaction at No. 913 Clybourne avenue, as follows, in answer to interrogatory 5 (p. 247):

"A. I asked for No. 30 Coats' thread. She walked to the drawer and handed "two spools of thread. She was a medium-sized woman, between 30 and 40 years "old. She looked rather German than American.

"Int. 10. Did you see them unwrapped, and if so, what make of cotton did you "find the spools to be? A. I seen them unwrapped and found that it was No. 30 "Merrick's."

And the witness identifies the two spools thus received as "Complainant's Exhibit Brown Spools 1 and 2."

She also visited the same place, 913 Clybourne avenue, again, between December 12 and 18, 1887, and asked for No. 50 "Coats'," and received "Merrick's."

"Int. 21. State whether on the last-mentioned occasion, having asked for "Coats' cotton, you received any other make of cotton? A. I asked for No. 50 "Coats', and received Merrick's."

She also says that the same person served her (Int. 22). Five spools were purchased on this occasion and found to be Merrick's (Int. 25), and they were produced and offered in evidence as "Complainant's Exhibit Miller Spools 7, 8, 9, 10 and 11."

On the part of the defendants *Mary Abraham* (pp. 675 to 681) is called to answer the evidence as to the sale of Merrick's thread for Coats', at No. 913 Clybourne avenue, and says nothing more than that she never sells Merrick's thread for Coats', but she does keep Coats' in stock along with Merrick's (Q. 4), and had them both in stock at the time the witnesses Brown and Miller testified they made their pur-

chases, and she buys Merrick's cheaper than Coats' (x-Q. 23), and sells it at the same price (x-Q. 24); and she says further, referring to customers (p. 678):

"x-Q 34. And if they say they don't know or they don't care, what do you "give them? A. Give them Merrick's.

"x-Q. 35. Because you make a bigger profit on it? A. Yes, sir."

And she believes she had Merrick's No. 30 in stock at the time of that purchase, which was what she gave the lady, but she did not have Coats' No. 30, which was what they asked for, as she generally kept No. 40 and 50 of Coats' (x-Qs. 42 and 43).

At the utmost, all her testimony shows for defendants is that possibly she made a mistake in giving them Merrick's for Coats', instead of selling it to them intentionally.

W. T. Hart (p. 681 to 690) and *Lois Hart* (pp. 700 to 705) are called to answer the testimony about 1662 Milwaukee avenue, but all that their testimony amounts to, at the most, is to say that they never intentionally sold Merrick's for Coats'.

So, *Caroline Jacklin* and *Emma Jacklin* (pp. 669 to 674) are called to answer the testimony about number 310 West Polk street, and their testimony is to the same effect as that above noted—that they never tried to deceive people by selling them Merrick's for Coats'.

But all of these people had Merrick's in stock, and the two Jacklins had never bought Coats', so if they sold anything, it must have been Merrick's.

None of the defendants' witnesses have any recollection of the particular incidents. It is submitted that the two ladies, Mrs. Brown and Annie Miller, who were specifically instructed to go to these stores, with the idea that they were to testify in regard to what they did and what they received there, are more reliable witnesses than those called by the defendants, who do not pretend to have any recollection of the incident, but simply, when called and virtually compelled to testify, say that they did not intentionally try to deceive any customers. Even if there was no intention on the part of those who did sell Merrick's thread for Coats', the evidence

Mrs. Brown and Annie Miller shows that such substitution frequently occurred in practice, and that the resemblance between the spools is such as to make the mistake of substitution easy.

(13) *Henry A. Young* (pp. 266 to 278), *Charles A. Koch* (pp. 279 to 286) and *G. Ford Carpenter* (pp. 287 to 294).

These three witnesses were called on the part of the complainants at Lake City, Minnesota. Young and Koch are members of the firm of C. F. Young & Brother, in that city.

The witness Henry A. Young produces a newspaper called the *Graphic Sentinel*, published at Lake City, Minn., on November 15th, 1887, and points out an advertisement his firm caused to be inserted therein, in regard to fraud on Coats' thread, which newspaper is offered in evidence as "Complainants' Exhibit A" (p. 268).

The advertisement is printed in the exact style it was issued, opposite page 734, and reads as follows:

"*Beware of fraud on J. & P. Coats' thread. Several manufacturers of thread are imitating J. & P. Coats' spools, and the fraud can only be detected in closely looking for the name on the printed label of the spool. See that J. & P. Coats' name is on every spool.*"

Mr. Young says (A. 6, p. 268):

"We sell Coats' thread extensively, and we inserted that notice for our own "protection. A German customer called at the store one day and said that her "daughter was very particular to have her get Coats' thread and no other kind, "since the last kind of thread which she got in another store, which looked like "Coats', was not satisfactory.

"7 Q. Can you state what kind of thread, as an imitation of Coats' thread, you "had in view at the time your firm inserted that advertisement? A. Merrick's "thread."

"8 Q. Is there any similarity in the general appearance of the spools and labels "on Merrick's thread with the general appearance of the spools and labels on "Coats' thread. A. The general appearance of both is very similar. Unless a per-"son compared them side by side, he would be very apt to be deceived."

He says Coats' is the leading thread sold in that vicinity (Q. 10), and also that an agent of the Merrick Tread Co. had called last fall, and asked their firm to buy Merrick's thread (Q. 11).

This witness says (A. 14) :

"The Coats' thread has obtained a very strong footing here, and I am sure that "Merrick's thread could not be sold in Lake City, unless it resemble the Coats "thread as to its spools and labels. Undoubtedly, we could pass off on our cus- "tomers a large quantity of any other make of thread, if only it was made to re- "semble Coats' thread in general appearance."

It appears, from his cross-examination, that his first advertisement—that of November 15th—was put in without any consultation with the Coats people at all, but was his own idea, and that afterwards, when Coats' agents saw it, they furnished Young & Bro. with some additional matter, which appeared in a subsequent advertisement in the "Graphic Sentinel," dated December 27, 1887, to a good deal the same effect as the first one.

The testimony of the witness *Charles Koch* is to the following effect: That he instructed G. Ford Carpenter and William Gardner to call at various dry goods establishments in the vicinity and ask for Coats' thread, only, but to take whatever was given (p. 279), and, pursuant to those instructions 32 spools were obtained, which are marked in evidence as "Complainants' Exhibit B." It is the heads of these thirty-two spools which we have reproduced in the plate opposite p. , *supra*.

Two of these spools were brought in by Mr. C. L. Dempster, and out of all those spools, fifteen were Merrick's and seventeen were Coats'. The witness *Carpenter* (p. 287) testifies as to visiting the different stores he mentions, and asking for Coats' thread, and says that he sometimes got Coats', and one time, in particular, got Merrick's, when he asked for two spools of Coats', and that he handed them, after being bought, to Mr. Koch. The substance of his testimony is that, having asked for Coats' thread at a number of places, he did, on some occasions, get Merrick's instead of Coats' and turned the spools over to Mr. Koch, where they appear as part of the thirty-two spools constituting "Complainants' Exhibit B."

The defendants, in answer, called *Harry Phillips* (pp. 690 to 700), their agent who was at Lake City, and is referred to in the testimony of Mr. Koch, who, as usual with defendants' witnesses,

admits everything in the witness Koch's testimony, except the use of words pointing out the resemblance between the Merrick and Coats thread, as an advantage in the sale of the Merrick; and, as usual, emphatically denies the use of any such words.

Mr. Phillips is the Merrick Company's own agent, and was summoned to Chicago to testify, and did so in the presence of Mr. Hopkins, president of the defendant company, and is very emphatic, under the circumstances, that he never did, on the occasion referred to, or any other, make any reference whatever to any similarity or dissimilarity between the Coats' and Merrick's spools.

The testimony, of course, shows that he was in Mr. Koch's store at the time referred to; that he was trying to sell him the Merrick thread; and he admits that everything was done just as Mr. Koch and Mr. Young say, except the calling attention to similarity of the appearance of the two threads.

It is for the Court to decide, in view of the testimony, whether a drummer for the defendant company, sent out to that region for the express purpose of introducing a new thread, would be likely to make use of any inducements of the kind Mr. Koch testifies, under oath, that Phillips used, and also how likely he would be to testify that he did not, or had no recollection of so doing, when brought to Chicago and summoned as a witness in the presence of the general manager and president of the company upon whom he is entirely dependent for his position.

Mr. Jesse T. Seley, of the firm of Seley & Buck, from whom complainants' Lake City witnesses have testified that they procured Merrick spools when Coats' were asked for is also brought on to Chicago and examined (642 to 643). He had both Coats' and Merrick's on sale at his store, but, of course, never sold Merrick's when Coats' was asked for. He has asked all of his clerks, and none of them ever did such a wicked thing (Q. 17 and 18), though it does appear that some of his customers returned Merrick's thread, which they had received at his place, and insisted on having Coats (p. 645, Qs. 28–30). How they happened to

have received the Merrick thread when they wanted Coats, does not appear.

Mr. Seely was induced to purchase Merrick thread because he got it for less than Coats', and sold it at the same price at retail, and since he put it in, he has been trying to sell Merrick's to the customers who formerly bought Coats' (x-Q. 6), and he has found it necessary to instruct his clerks not to sell Merrick's to people who ask for Coats' (x-Q. 68). Why this instruction, unless the thing had been done and complained about?

Some of his admissions are worth quoting (p. 648):

"73 x-Q. Have you heard anything said by your customers as to Merrick's "spools looking like Coats'? A. No, sir."

"74 x-Q. Don't you think they do look like them? A. The spools, I think, do "somewhat; but the labels are different.

"75 x-Q. In what respect do you think Merrick's spools are like Coats'? A. "There's numbers on the end.

"76 x-Q. If the paper labels on the upper ends of both a Merrick and Coats' "spool of the same number, say forty for example, happen both to be removed by "some accident, do you think an ordinary customer could tell the Merrick's spool "from the Coats' by ordinary examination? A. They might not.

"77 x-Q. Then the printed name on the label is what distinguishes Coats from "Merrick's, is it? A. That's what I think.

"78 x-Q. And if that printed name is not noticed or read, there is a very great "similarity between the upper or embossed spool heads of Coats' and Merrick's, is "there not? A. They look alike; yes, sir.

"80 x-Q. How do you find it with your customers who formerly bought Coats'; "are you able to sell them Merrick's instead of it? A. Yes, sir.

"93 x-Q. Then you have supplied customers asking for Coats' with Merrick's, "but claim that the difference has always been explained to the customer; is that "it? A. That's what I think.

"118 x-Q. Did you ever know of any one being deceived into taking Merrick's "thread, supposing it was Coats'? A. I don't remember of anybody just now.

"120 x-Q. If a person of good reputation to your knowledge testified under "oath that he had been so deceived, would you believe him? A. I think I would."

These instances are only examples, collected from a few widely separated points, of what was going on all over the country. The defendants were sending out their agents in all directions, and these agents were going to retail dealers who had formerly carried a stock of Coats' thread, and were persuading them to replace it with Merrick thread by the offer of larger discounts and consequently greater profits, *and by the representation that they could pass it off on their customers who wanted Coats' thread, owing to its great resemblance*

to that thread. This was the defendants' practice, as proved by the evidence.

The result of such dishonesty is shown in the prosperity of which the defendants boast. While other concerns were making their way slowly on their own merits, they were rapidly rising on the reputation and at the expense of the plaintiffs.

President Hopkins begins his testimony with an enumeration of the Merrick Company's 300-feet mills and its 200-feet mills and its 150-feet mills, and its fifty thousand spindles, and its thousand employees (p. 297, Q. 11). It is very suggestive, however, to observe the period of its growth.

Merrick Bros. & Co. had for several years been manufacturing three-cord thread in Connecticut. But in *1865*, when the defendants were incorporated and went to Holyoke and began to make six-cord thread and label it the "American Thread Company," he tells us that they put in *ten thousand* spindles and employed about *one hundred* men (p. 337, x-Q. 297). In another portion of Mr. Hopkins' testimony (p. 368, x-Q. 616), we find that in *1877*, after *ten* years of the manufacture of the "American" six-cord thread, they were running about *fifteen thousand* spindles, with probably one hundred and fifty men employed. Then a year or two later they sent out their six-cord thread with a new name, but in the dress and with the appearance of the Coats' thread, and in a period of less than *seven* years (he gave this testimony in May, 1886), as we have seen (p. 267, Q. 11), they were running about *fifty thousand* spindles, and their pay-rolls *had for five years* averaged a *thousand* names.

It also appears (p. 719, Q. 24) that, in 1888, they were completing another factory at a cost of half a million dollars, and with a capacity of *thirty thousand* additional spindles.

In *ten* years the defendants, on their merits, had added only 5,000 spindles to their running capacity. In *seven* years they had added to their business 35,000 spindles, and, *two* years later, were about to add 30,000 more, making a total of 65,000 spindles in a period of nine years, and all on the reputation of the plaintiffs.

No further details of the growth of their business could be obtained from Mr. Hopkins, for he sees the drift of the questions after being asked (p. 372, x-Q. 655) if the great growth of his company had not been since the year 1878, and refuses to give any further information or to produce any books which would show the amount of production in the different years, and he is sustained in this refusa by his counsel (p. 372, x-Qs. 656–660).

To recapitulate on this point, an inspection of the plaintiffs' and the defendants' spools proves conclusively that the simulation of the general appearance of the Coats' spools by the Merrick Company is calculated and likely to deceive ordinary purchasers, and this conclusion of the senses is confirmed by the proof that in many instances not only casual observers, as most purchasers are, but dealers familiar with both threads, and handling them every day, have actually taken one thread for the other, without suspicion.

It is proved, also, that this deception was carefully planned, and intended, by the Merrick Company by the fact that they had previously been making their six-cord thread only under a fictitious name, and realized the difficulties of introducing a new thread under a new name; by the fact that they knew the reputation of Messrs. J. & P. Coats as the leaders in the trade, and knew the distinguishing features and characteristics of the Coats' thread; by the fact that, when they adopted the embossed numerals and small black and gold labels previously used exclusively by J. & P. Coats to introduce their "Merrick" six-cord thread, they also reversed the arrangement of colors in their old "American" label, in order to make the general resemblance complete, but at the same time left several differences in the details of the ornamentation of their spool heads, in the hope of escaping all responsibility for their fraud; by the fact that they carried the simulation only to the lines of thread in which they compete with the complainants in the small retail market, and do not change their old three-cord labels, or use embossed numerals on their 1200 and 2400 yard spools which are sold directly to manufacturers and jobbers and always in large quantities; by the fact that they put up their thread in

boxes with an arrangement of marks and labels very similar to that of the Coats' boxes; by the fact that they returned evasive answers and alleged insufficient and misleading reasons for their course of action, when warned that their acts were an infringement of the complainants' rights; and by the fact that they sent out their agents to persuade retail dealers to replace their stock of Coats' thread with Merrick's, by holding out to them the inducement of greater profits and the representation that they could pass it off on their customers for Coats' thread.

And, finally, it has been proved that the fraud they intended has resulted, and that they have actually succeeded in palming off their thread as and for the thread of the complainants, and are now enjoying the fruits of their wrongful acts.

We will, further, only call attention to some interesting admissions made by the defendant's two principal witnesses, Mr. Hopkins and Mr. Knox. The testimony of Knox is at page 482. He is asked:

"390 x-Q. I call your attention to the statement in your affidavit of December "20, 1856, where you say, 'One end of Brooks' spool is raised and slightly "'rounded.' Do you remember the particular formation of Brooks' spool then "alluded to?

"A. I do.

"391 x-Q. Did that formation give to the Brooks spool a distinctive appear- "ance, as compared with those of other manufacturers?

"A. It did.

"392 x-Q. Did you know of any other manfacturer who so shaped one end of "their spools?

"A. I do not recollect that I do.

"393 x-Q. Do you think *it would have been a case of unfair business method* for "a manufacturer *to have imitated Brooks' spools in that respect?*

"A. *Yes; I do.*"

If it is an unfair business method to imitate the Brooks spools in that particular, we submit that it is also unfair business to imitate the much more distinctive appearance of the Coats spools.

Let us also see what Mr. Hopkins says (p. 398):

"915 x-Q. If one manufacturer had adopted and used for a series of years one "particular pattern of embossment on his spool heads, so that his spools had be- "come recognized as the only ones which had that pattern, do you think that it "would be fair for another manufacturer to adopt and imitate that pattern? A. I

"think if a man adopts a symbol or particular pattern, and his goods become known "by that symbol and that pattern, I don't think it would be right for another man "to make one just like it, just in the same way that I would say his name.

"916 x-Q. Do you think, under the circumstances mentioned in the last ques- "tion, that it would be fair and honest dealing to adopt and imitate the pattern of "the manufacturer first spoken of, even though the party who imitated his pattern "did put on his own name?

"Former question re-read. A. I don't think it is right for any manufacturer to "put anything on his goods to try to sell them for another's; if he makes difference "enough in his labels and marks so that the people can understand them, I don't "think that he is infringing on the rights of any others.

"917 x-Q. Cannot you answer the last question specifically; please hear it read "again in connection with the preceding one, and answer it as specifically and "definitely as possible?

"Said questions read to witness. A. Not if the parties' goods were known ex- "clusively by that embossment.

"918 x-Q. How would it be if they were *partially* or *to some extent* recognized "by that embossment, would your opinion be any different? A. That would "depend entirely upon how much they were known by. If that was what they "asked for in the market, a spool embossed by a particular pattern, then I should "think it would be wrong for any one to do it in that way.

"919 x-Q. Do I understand you to mean that you think that if the first manu- "facturer's goods were only recognized to a small or limited extent by the emboss- "ment, that then the man who imitated it would be acting honestly, but if they "were known to a considerable extent by reason of the embossment, that then "the imitator would be unfair and dishonest?

"A. I mean to say that if a person bought a spool by the embossment of a par- "ticular pattern, and it was known in the market by that pattern. I don't think it "would be right for another to make it so near that people would be deceived; "that is as near as I can get to it; and I will say, right here, there has been so "many patterns of embossed spool heads that, in my mind, they don't give any "particular idea of who the manufacturers are.

"920 x-Q. I am assuming a case of a manufacturer who adopts, before any one "else, a particular pattern for embossing his spool heads, and I ask you whether, "if the spools of such a manufacturer should become known to the public and come "to be recognized to *any* extent (*greater or less*) by that embossment, *whether you "would consider it fair and honest* for another manufacturer who knew those facts "to imitate the first manufacturer's embossed pattern, even though the imitator "put on his own name? A. *I don't consider that it would be right for one man to "imitate another so that his goods would be bought for those of the other*; that is "as far as I can go.

"921 x-Q. Cannot you be any more specific than your last answer? A. No, "sir."

Now, Mr. Hopkins was driven right to the wall and he had to substantially admit, notwithstanding his great reluctance to make the admission, that it was an unfair and a dishonest practice when any manufacturer's goods were known to *any* extent by the embossment or by the pattern of his spools, for another manufacturer,

knowing those facts, to put that same embossment or that same pattern on his own spools.

He was asked on the re-direct examination, after an adjournment, whether he thought the above questions had any applicability to the present case, and he said he did no think they did.

To what case do they have an applicability, if not to the present case? This man confesses that he knew of this embossed pattern and this label on the Coats' spools; he had known it for two or three years before he adopted these things. He knew that Messrs. J. & P. Coats were the only persons who used that embossment, and yet he deliberately adopted it under the circumstances we have shown. We submit to the judgment of the Court whether his own admissions as to what would be fair and honest, or unfair and dishonest, are not conclusive against him in this case.

V.

This trade property acquired by the plaintiffs did not pass into the public domain and become the legal prey of pirates on the expiration of the Conant design patent.

The Conant design patent was a seven years' patent, the term of which expired in 1877.

We have already discussed the effect of its expiration on the registered trade-mark of 1875. It remains to consider the effect on the complainants' acquired trade property, or, as Lord Justice LINDLEY has called it, the common-law trade-mark of the plaintiffs. This is a somewhat different question, and requires especial attention, because it seems to have been the turning point of the case, in the mind of the learned Judge who tried the case in the Court below. For the defendants, it is urged "that since the expiration of said

" patent, the use of such numerals embossed upon the wood, in " connection with paper labels, as aforesaid, has become public " property, and open to the defendants and all others to employ, if " they see fit" (Answer, p. 14). They contend that they have seen fit to make use of the embossed numerals, and that in so doing they have exercised only their legal rights.

On this point they were sustained by the Circuit Court.

We quote from Judge WHEELER'S opinion (p. 737, fol. 1144):

" The embossed numbers do not of themselves indicate origin at all, but the " long and exclusive use of them by the plaintiffs may have so associated them " with their label and thread that the use of them by the defendants in connection " with their label might lead ordinary customers, to some extent, to think that the " thread was from the plaintiffs. If so, the use of them in that manner by the " defendants would amount to a representation, so far, that the thread of the " defendants was that of the plaintiffs. However this may be, but for the " patent, the defendants might, with equal right, have used the numbers as the " plaintiffs did. When the patent expired, the use became common to all, as if there " had never been any patent covering them. The plaintiffs held the monopoly " during the term of the patent subject to the consequences of its expiration. The " incidental effect upon the plaintiffs' trade of the use of the numbers by the de- " fendants is one of these consequences. It does not arise from any wrongful " invasion of the plaintiffs' rights, but from the rightful exercise of the defendants' " rights. The plaintiffs' mode of exercising their monopoly by using the numbers " exclusively themselves exposed their trade to what might be inferred from that " when the use should become common. The law does not extend the " patent beyond its terms to protect them from such results *Fairbanks vs. Jacobus*, " 14 Blatchf., 337; *Filley vs. Child*, 16 Blatchf., 376; *Wilcox & Gibbs S. M. Co. vs.* " *Frame*, 21 Blatchf., 431; 17 Fed. Rep., 623; *Gally vs. Colts' Fire Arms. Co.*, 30 " Fed. Rep., 118. The facts of this case, as they appear from the proofs, do not " bring it within the principles of *McLean vs. Fleming*, 96 U. S., 245; *Frese vs.* " *Bachof*, 14 Blatchf., 432; *Shaw Stocking Co. vs. Mack*, 12 Fed. Rep., 707; *Car-* " *bolic Soap Co. vs. Thompson*, 25 Fed. Rep., 625: *Kinney vs. Basch*, 16 Am. Law " Reg. U. S., 596, and note, and others of the same nature relied upon for the " plaintiffs. Much and repeated considerations of this case discloses no apparent " ground upon which the bill can be maintained."

This is a remarkable proposition to come from a court of equity. Fraud is the basis and whole substance of the action, and the learned Judge seems to admit that the results of a fraud are apparent. He finds that the Coats' thread has become known by the peculiar ornamentation of their spools, and that the defendants, by their acts, have to some extent, at least, misrepresented their thread as the thread of the plaintiffs. In other words, he finds that the defendants have deceived the public and have palmed off their thread upon them as

the plaintiffs' thread. He could scarcely have found otherwise on the proofs presented, but concludes that they have committed this fraud in a perfectly legal way.

We cannot believe that this conclusion is law. The public, if not the complainants, have right to be protected. And we submit, with all respect, that the decision is not warranted by one of the cases cited in its support.

Let us examine these authorities.

Filley vs. Child was an action to enjoin the use of the words "Charter Oak" as applied to stoves. It appeared that the complainant had for twenty-one years acquiesced in the defendant's use of the name "Charter Oak," a name given by the complainant to a stove made under a patent owned by him. Mr. Justice BLATCHFORD then Circuit Judge, held that:

"*Under such circumstances*, the plaintiff cannot, after his patent has expired, "and when Mr. L. Filley has the right to make stoves containing said improve- "ments, prevent him from calling them by the name of 'Charter Oak,' *so long as* "*he does not represent them as being made by the plaintiff or induce others to* "*believe that they are made by the plaintiff*" (Italics ours).

So in *Fairbanks vs. Jacobus*. Judge JOHNSON there said:

"As to the charge that the defendant threatens various supposed wrongs to "the plaintiffs, in imitating their manufacture, and that he represents his scales to "be of the plaintiffs' make, *the allegations are not so made out as to satisfy my mind* "*of their substantial truth* (*Bryan vs. Bullard*, 1 *Curtis' C. C. R.*, 100). I doubt "whether the defendant meant anything beyond the assertion of a right to use the "words on the scales, which had for many years been openly used by him and his "predecessors, under a claim of right, and for some time, at least, and to some "extent, with the knowledge of the plaintiffs or their predecessors.

"Certainly, if the words 'Fairbanks' Patent' do not mean to assert the existence "of a patent securing the scales, but only that they are made in conformity with, "and embody the invention of, the expired Fairbanks' Patent, they are free to all "the world. *What is not free is, to pretend that a scale is made by one person* "*which is, in fact, made by another.*

"In trade-mark cases, it is by no means of course to grant preliminary "injunctions, even when the plaintiff's case seems to be made out; and I shall, "therefore, leave the further consideration of the case to the final hearing, when "the questions as to the defendant's claim of right to the use of the words 'Fair- "banks' Patent,' and the other questions of fact just referred to * * * can, if "necessary, be further considered" (Italics ours).

In *Wilcox and Gibbs S. M. Co. vs. Frame*, Judge WHEELER himself uses the following language:

"A manufacturer of a patented article, after the expiration of the patent, has a "right to represent that it was made according to the patent, and to use the name "of the patentee *for that purpose* [authorities]. Anything descriptive of the prop- "erties, style or quality of the articles *merely*, is open to all [authorities]. While "*no one has the right to sell his own wares as the wares of another*, every one has the "right to make and sell any wares not protected by patents. Marks, symbols or "dress, placed upon wares, *might unlawfully misrepresent their source*; but when "left to speak for themselves alone, there could be no wrongful misrepresentation" (Italics ours).

Finally, *in Gally vs. Colts' Fire Arms Co.*, Judge SHIPMAN decides:

"The name 'Universal,' or 'Universal printing press,' was adopted at the time "the patents were issued to designate the patented press. *It was not a trade-* "*mark of the plaintiff which became identified with his workmanship, and indicated* "*that the press was of his manufacture*, but was a name which characterized the "press which he invented. Any manufacturer who uses the name now does so to "show that he manufactures the Gally press, which he may rightfully do, *and* "*does not represent to the public that it it getting any skill or excellence of workman-* "*ship which Gally possessed, and does not induce it to believe that the presses are man-* "*factured by the plaintiff*." (Italics ours.)

As we read all four of these cases, they decided simply that the names, the use of which was there sought to be enjoined, had become names *publici juris* in accordance with the rule laid down in *Ford vs. Foster*, L. R., 7 Ch. App., 611, 626, and recently approved by the Court of Appeals of England in *Reddaway vs. Bentham Co.*, L. R., 1892, 2 Q. B. D., 639, 643, as follows:

"I think the test ought to be whether the use of it by other persons is calculated "to deceive the public—whether it may still have the effect of inducing the public "to buy goods not made by the original owner of the trade-mark as if they were "his goods. If the mark has come to be so public and in such universal use that "nobody can be deceived by the use of it, and can be induced, from the use of it, "to believe that he is buying the goods of the original trader, it appears to me, "however hard, to some extent, it may appear on the trader, yet, practically, as the "right to a trade-mark is simply a right to prevent the trader from being cheated "by other persons' goods being sold as his goods through the fraudulent use of "the trade-mark, the right to the trade-mark is gone."

So far from sustaining Judge WHEELER in his opinion that these defendants are right in any use they may choose to make of the subject matter of the expired Conant design patent, *although* they

may by such use misrepresent their goods and deceive the public, they hold that they have a right *only to such a use* of it as *does not represent* their goods as being made by the plaintiffs or induce others to believe that they are made by the plaintiffs; and they imply, as strongly as cases can imply, that any use that naturally and intentionally leads to deception would be unlawful and would be enjoined.

But we are not left in any doubt as to what the law would do in case of a fraudulent use of shapes or indicia originally associated with a now expired patent. There are several decisions expressly on this point.

The earliest case is that of *Eddleston vs. Vick*, 18 Jur. 7 (Cox Am. T. M. Cas., 666), decided by the English Court of Chancery in 1853.

There T. had taken out letters patent which expired in 1844 for the manufacture of solid-headed pins, and had carried on the business under the firm name of T. & Co. In such business he had used parti-colored labels in pink and green, on which the pins were described as "Patent Pins Exclusively Manufactured by T. & Co." E., holding title under T., carried on the business and used the said labels. In 1853 he discovered that V. was using labels in palpable imitation of his own. On this statement of fact—

"It was held, *first, that E. was entitled to restrain such palpable imitation by V.* "*Secondly*, that E. was not disentitled to sell by reason that the representations on "his labels were no longer accurate, although the pins were not protected by "patent, nor manufactured strictly according to the patent, nor exclusively or at "all by T., who had long since retired. *Thirdly*, that V. was not to be precluded "from representing that his pins were manufactured according to T.'s patent (now "expired), *but he was not to do so in a manner liable to deceive.*" (Italics ours.) An injunction was granted.

So in *Sawyer vs. Horn*, 1 Fed. Rep., 24, from which we have already quoted. One of the distinguishing marks of the washing blue made by the complainant was the form of the box—a small, wooden cylinder with a perforated tin top—in which the blue was put up. The plaintiff had patented this box, but the patent had been declared invalid both by the Circuit Court and by this Court on appeal. The fact of the invalidity of this patent was set up in the answer and

urged by the defendants. But the Court decided that the complainant

" was the first to put up his bluing for sale in the peculiarly shaped and labeled " boxes adopted by him, and as his goods have become known to purchasers, and " are bought as the goods of the complainant by reason of their peculiar shape, " color and label, no person has the right to use the complainant's form of package, " color or label, or any imitation thereof, in such a manner as to mislead purchasers " into buying his goods for those of the complainant, whether they be better or " worse in quality."

And he enjoined the defendant from the use of the *box*, as well as of the label and arrangement of colors.

This case is important because the charges of the bill and the defenses were almost identical with those in the present case. The long opinion of Judge MORRIS, and his review of the authorities, are particularly applicable to this case.

The case of *Societé Bénédictine vs. Cook*, Albany Law Journal, Vol. 37, No. 13, decided by the Supreme Court of the State of New York, in 1888, involved the very question here raised, viz., the effect of the expiration of a design patent on a trade property identical with that of these complainants, and is pertinent on this point. We quote:

" The whole of the defendants' argument is based upon an asserted legal right " to use the bottles, and the labels and designs. This they contend, because they " purchase in the market empty bottles which have contained the plaintiff's cordial, " and are of a peculiar shape, and because the plaintiff's predecessor in business " and assignor had taken out a design patent which expired in 1882, and, in conse- " quence of which, it is claimed, the designs became the property of the public, " and open to use by whomsoever may choose to adopt them. Assuming that after " the expiration of the design patent the defendants acquired a right to use the " labels in common with the plaintiff, such right would be confined to an honest, " and not a fraudulent, use. The power of a court of equity to enjoin the use of " names, symbols and marks of merchandise, does not depend altogether upon an " exclusive right which a plaintiff may be supposed to have in such names, symbols " or marks. The power is exercised where the defendants have had a clear right to " use names, as in the Day and Martin blacking case, 7 Beav., 84, the Devlin case in " this Court, affirmed, 69 N. Y., and in other cases. *It is the whole combination of inci- " dents carefully arranged, with the labels as the most conspicuous and effective of all, " that constitutes the fraud, and makes out a case of one party attempting to sell his " goods as those of another. The legitimate use of the designs by the defendants should " not be enjoined, but their use under the circumstances disclosed in this particular " action calls for the exercise of the restraining power of the Court*" (italics ours).

This case was subsequently removed to the United States Circuit Court for the Southern District of New York, but was remanded to the State Court, as it did not involve any Federal questions. In granting the motion to remand, Judge WALLACE said (40 Fed. Rep., 382):

"The answer, among other things, alleges that Letters Patent of the United "States for a design for a bottle were granted in 1868; that the time of the patent "has expired, and that the bottles, labels, etc., which defendants are using are "those which have become public property ever since the expiration of the patent. "If the defendants are in good faith using the bottles and labels of the patent, "their acts to that extent are lawful, and would no more be an infringement of the "rights of the plaintiff than if they were using them with the consent of the "plaintiff, and had acquired a valid right to use them before the right of the "plaintiff had accrued. *But, if they are using them under false colors, as devices, "among others, intended to lead the public to believe that they are selling the liquor "made by the plaintiff, they cannot shelter themselves behind the expired patent.*" (Italics ours.)

All the above cases—those in which injunctions were refused as well as those in which they were granted—turned on the same question, viz.: Is the use by the defendants of the subject matter of the expired patent, either by itself or in combination, intended and calculated to deceive, and have the defendants been enabled by such use to palm off their goods as the goods of the complainants? In the cases cited by Judge WHEELER this question was answered in the negative, and in the other cases it was answered in the affirmative.

This brings us, therefore, back to the question of fraud—the principle underlying all cases of unfair trading—with which we started. The expiration of the Conant Patent, even granting that it did cover the exact design which the complainants have used on their spool heads, does not affect this question. If the defendants have intented to pass off their thread on the public as the thread of the complainants by means of a simulation of the complainants' marks, they have been guilty of a fraud which a court of equity will enjoin; if they have not done, so the decree of the Circuit Court dismissing the bill was correct. In either case the question of the patent and its expiration is wholly immaterial.

We submit that we have proved conclusively that, while it was

open to the defendants to avail themselves of the utilities of the Conant design in several ways, which would have been entirely unobjectionable to the complainants, as by embossing the design on a black spool, or on the other end, or by stamping the numerals, they deliberately and intentionally selected that which was most likely to enable their thread to pass current for the Coats' thread, and that in so doing they have been guilty of a fraud.

VI.

There is no Foundation for the Charge that the Complainants have been guilty of a Fraud, and have, therefore, forfeited their Right to the Protection of a Court of Equity.

The sole affirmative defense attempted to be proved on the part of the defendants is that embodied in the allegation of their answer (p. 22), which sets forth that the higher numbers of 200-yard spool thread of the complainants' make, viz., those numbers above 100, have been represented to be six-cord thread, whereas they are not and have not been, in fact, made of six cords, but are made of only three cords. This the defendants allege to be a fraudulent representation, and a fraud on the public of such nature as to prevent a recovery in this suit.

This is a grave charge to make against a firm of manufacturers who, for more than three generations, have been known as the leading manufacturers of spool cotton in the world, and who are probably as high-minded manufacturers as are to be found in this or any other country, and whose thread, to quote from the defendants' brief on the hearing below, "was known in ever hamlet in the land before "the Merrick enterprise was born."

The bill of complaint, as originally filed, undoubtedly did con-

tain certain allegations which were, on their face, somewhat too broad, *unless interpreted and limited by the schedules* which accompanied and were made a part of the bill. The mistake was wholly due to inadvertence and was satisfactorily explained to the Court below, and an amendment was allowed on the hearing to conform the pleadings to the facts (see opinion of Judge WHEELER, p. 736). We can, therefore, dismiss all questions as to fraud in the allegations of the bill. In order to obtain a foothold on this ground of their defense, the defendants must show that the complainants have been guilty of false representation in connection with the trade property which they seek to uphold.

The facts of the case are as follows:

The thread manufactured by the complainants and put up on spools containing 200 yards, represents a series beginning with No. 8, the coarsest, and running up in graded sizes to No. 200, the finest. The lower numbers represent size and strength, the upper numbers fineness and softness. Now, it is impossible to get the required fineness and softness in the higher numbers by making the thread of six separate cords, and so manufacturers universally, as the proofs will show, have made the higher numbers of thread of the same quality and excellence as the courser numbers, but of three cords instead of six. For a number of years, No. 100 has represented the dividing line in this series between the thread made of six cords and that made of three, it having been gradually raised, with the development of machinery used and the demand for a stronger thread, from 40 or 60 to that number. So the 200-yard spool cotton manufactured by the complainants in numbers up to and including 100, is, and for years prior to the commencement of this suit was, made of six separate cords, and their 200-yard spool cotton in numbers from 110 to 200 is and was made of only three cords.

Not one of the spools numbered above 100, however, has the complainants' registered trade-mark or the distinctive features of the trade property claimed by them upon it. This trade-mark—the combination of the embossed numerals on the natural colored wood

of the spool with the small black and gold label—is *only* on No. 8 to No. 100—that is, only on six-cord thread. There is no pretense that it has ever been used on the three-cord thread. All of the high number spools, from 110 to 200, have no embossed numerals at all upon them, but an entirely different design, and all of them have on the label, "J. & P. Coats' Best Spool Cotton"—not "Six-Cord," but "Best Spool Cotton" (see Exhibits).

On the single spools, therefore—and it is the single spools which go into the hands of the great mass of retail buyers—there is not even the semblance of a misrepresentation. All the thread that is six-cord is labeled "Six-Cord," and all that is three-cord is labeled simply "Best Spool Cotton," and it is, in fact, the *best*, because, for numbers *above* 100, in which softness rather than strength is desired, 3 cord is better than 6 cord.

This 200-yard spool cotton, alike below and above No. 100, is put up and goes to the retail dealers in boxes containing a dozen spools, all of one general style and appearance. All boxes containing thread up to and including No. 100, or six-cord thread, have, and always have had, a label on the top with the words "Best Six-Cord "Cotton for Hand and Machine," and all boxes containing numbers above 100, or three-cord thread, have, and always have had, on their top labels, the words "Best Sewing Cotton for Hand and Machine "Sewing," instead of "Best Six-Cord Cotton" (see exhibits). So far, there is no pretense that there has been any misrepresentation.

There was one exception to the fact that every box of three-cord cotton has a top label having the words "Best Spool Cotton," and not "Best Six-Cord Spool Cotton."*

About five years before the testimony of Mr. Auchincloss was given, in 1885, the complainants thought that they would try to make

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* *On the very last day* of the taking of testimony, when complainants had no right to reply, and at a time when, under the orders of Court, limiting defendants to rebuttal, the defendants had no right to introduce any such proof. The defendants' President, Hopkins, introduced two boxes, a 120 and a 130, which had the "Best Six Cord" top label. He did not say where he obtained it, and there is no more evidence to connect the Messrs. Coats with these boxes than there is to connect Hopkins himself. They are not even proved *not* to be six cord.

the next highest number above 100, No. 110, of six cords, to see if the public would like it, if made of six cords instead of three. No manufacturer in the United States, or in the world, had ever before or since (with an exception to which we shall refer presently) made any sewing cotton above No. 100 of more than three cords; but Messrs. Coats thought they would try the experiment, and consequently made their No. 110 cotton of six cords, and while so making it of six cords they had a top label on the box marked "Best Six-" Cord Sewing Cotton," just like the others, numbers 8 to 100. They found, however, that these sales of No. 110 thread fell off; that the public did not like a six-cord as well as a three-cord thread in that size, and abandoned the experiment after a thorough trial of three or four years. They had in stock, probably, a considerable number of the old boxes with the old six-cord labels on them, which were used when the thread was, in reality, six cord, and one of these boxes was found by the defendants containing thread which was three cord, and it was produced with great show on the cross-examination of Mr. Auchincloss. He, however, explained the occurrence as an accident due to inadvertence and stated how it had occurred, as above (p. 72, x-Qs. 72–79, and particularly x-Q. 79).

Now, is that a "fraud" on the part of the complainants, an iniquity on their part so gross that this Court should say that they are not entitled to relief? Is it a fraud that after a faithful experiment to ascertain if the public wanted a No. 110 thread with six cords, and, after finding that it did not, that, accidentally, and without the slightest proof of any evil intent or any design to benefit by the transaction, some of the cotton is found in the old boxes? We think that there is but one answer to this, and that is the answer given by Lord Justice GIFFORD to a similar charge of fraud in the case of *Lee vs. Haley*, 5 Ch. App., 155, 158. He said:

"Now, as to short weight, if the plaintiffs had been systematically and *know-*
"*ingly* carrying on a fraudulent trade and delivering short weight, it is beyond all
"question that this Court would not interfere to protect them in carrying on such
"trade; but there is no evidence that proves anything of the sort. * * * It is
"quite clear that they have never knowingly delivered short weight; it is quite
"clear that they had used all the precautions that tradesmen can be expected to
"use in cases of this description; *and I must say that this defense is most unjustifi-*
"*able, and is not creditable to the defendant.*" (Italics ours.)

But the boxes in which the complainants packed their thread also had a label on the bottom and a printed flap inside, and it is true that these bottom labels and inside flaps

BOTTOM LABEL.

INSIDE FLAP.

were uniformly the same *for the whole series of thread from No. 8 to No. 200.* The defendants contend that the complainants have also been guilty of fraudulent misrepresentations in their use of these

labels. This charge, as well as the preceding charge of fraud, were not noticed by the Judge below in his opinion.

As a complete answer to this defense we submit the following considerations:

FIRST. The very great preponderance of sales of spool cotton is in numbers below 100, the sales above that number being comparatively very small. This shows conclusively that there could have been *no motive to deceive*.

Ives (p. 107, Qs. 8, 9) states that in the case of the Willimantic Company, the sale of 200-yard thread in numbers over 100 is less than one-tenth of one per cent. as compared with the amount of sales of numbers lower than 100, and is decidedly insignificant.

So *Russell* (p. 119, Q. 7) states that the sale of Clark's Mile-End thread in numbers above 100 is less than one-tenth of one per cent. of the sale in numbers below 100, and that he believes the same is true in the case of other manufacturers.

So *Brightson* (p. 158, Qs. 11–14) states that the sales by H. B. Claflin & Co., in the City of New York, of 200-yard spool cotton in numbers above 100 is very small indeed, considerably less than one per cent. as compared with the sale in numbers above 100. This is also true in case of other firms with which he has been connected.

So *Dallon* (p. 171, Qs. 12, 13) states that the same is true of E. S. Jeffrey & Co.; that the sales of the higher numbers was a very small fraction of the total sales of spool cotton.

So *Frost* (p. 174, Q. 9) gives similar evidence as to sales of spool cotton by Dunham, Buckley & Co.

So *Cox* (p. 192, Q. 19) testifies generally as to sales of all the leading makes of thread including Coats', the two Clarks and the Willimantic.

All the witnesses called by the defendants to testify on this point, under cross-examination, give evidence to the same effect, showing that numbers above 100 are only used for special purposes, such as for fine embroideries, tambour work, and things of that kind where a soft, delicate thread is desired, and are a very small fraction of their total sales.

SECOND. The other large manufacturers did not make thread in numbers above 100 of six cords, but of three cords, and yet used boxes and labels of a similar style for the whole series, high numbers as well as low numbers, and sold them all for the same price. The Merrick Company did exactly the same thing.

See Complainants' Exhibit Comparative Samples and the testimony of Ives (p. 107, Q. 10), of Russell (p. 120, Qs. 8–9) and of Miller (p. 181, Qs. 14–16 and p. 225).

Of course, if any action is wrong it is no excuse to say that others also have been guilty of it.

But in determining whether a given act is or is not in its nature fraudulent, inequitable and of such a character as to deprive a suitor of all title to relief, it is material to consider whether the acts charged upon him are or are not in accordance with the recognized and ancient usages of his business.

Mr. Miller (p. 225), testifies to having purchased ten spools of Merrick No. 140 and No. 150 thread in Jersey City as late as February, 1888. He paid five cents each for these spools, the regular six-cord price, and received them, on asking the dealer whether she had any Merrick *six-cord* thread, in numbers over 100. He also says that he has examined these ten spools, and found the thread to be three-cord (Qs. 1–10; see also p. 214, Hornblower, Q. 15).

The testimony of *Hopkins*, on his examination, also shows that it is the fact that the Merrick Company put on the market and sold three-cord in the higher numbers at a six-cord price, with the black and gilt label, bearing just as close a resemblance to the Merrick six-cord as Coats' higher numbers do to their lower numbers. He also admits that this was the universal custom with all dealers (p. 721, Qs. 42–46; p. 348, x-Qs. 411–465; p. 391, x-Qs. 862–866).

These spools all had the black and gold label, similar to that of the Merrick six-cord thread in the lower numbers, but the words "Six Cord" do not appear on the label.

The facts of the defendants' case is exactly a parallel one to that which they now claim to have been a fraud on the part of

the complainants, namely, selling three-cord thread in the higher numbers with black and gold labels changed only by omitting the words "Six Cord," but representing it to be six-cord, and selling it for the same price as six-cord thread.

We come now to the *one* exception to the statement we made, viz., that no manufacturer, before or since the complainants' experiments with No. 110 thread, have ever made thread of six cords in numbers higher than 100. This exception is the defendant company itself. But this was *after* the beginning of this suit, and *after* the defendants had trumped up this charge of fraud against the complainants. They thought that it would not be becoming for them to accuse the complainants of doing just what they, and the trade universally, had been doing for years, and so they began at once to sell their fine numbers of thread at a reduction from the price of six-cord thread, and also to make these higher numbers of six cords. The dates are very suggestive. The complainants' bill was filed in May, 1883, and the answer, with its allegations of fraud, in January, 1884. The defendants began to make six-cord thread in the higher numbers a few months later, perhaps three months before the first of January, 1885 (p. 350 x-Qs. 426–430). There is no doubt as to these dates; but Mr. Hopkins squirms and wriggles over the date when he first became conscience stricken at charging six-cord prices for the higher numbers of his thread, and reduced his prices on this thread. It is believed, however, that a careful reading of his testimony will show that this change, also, was not made till after the commencement of this suit (see Qs. 416–421). It would look as if his attention was called to this matter by the allegations of the defendants' answer to the bill of complaint.

But there is another thing; this six-cord cotton which the defendant makes in high numbers *just to say* that it makes it, *is not really of the number which it purports to be;* it is not really No. 140 or No. 160. It is labeled so, but it is in fact larger. They cannot make a six-cord cotton and have it really 140 or 160; they cannot get the yarn fine enough to twist down and make the proper

size and yet make it of six cords; and Mr. Hopkins himself admits that they *intentionally* make it larger than the standard. Why? Because they *cannot* make it of the standard sizes. They would not intentionally make it larger than the standard if they *could* make it as small as the standard. Mr. Hopkins says (p. 378):

"727 x-Q. Is it true that three-cord, four-cord and six-cord thread of the same "number are, or ought to be, of the same size, irrespective of the number of cords? "A. *They ought to be.*

"728 x-Q. And in the case of your manufacture, are they so? A. I couldn't "say that they all were.

"729 x-Q. Do you endeavor to make them so? A. *I think we do.*

"734 x-Q. Do you endeavor to make your No. 110 six-cord of the same size "as No. 110 three-cord? A. I think it is a little coarser.

"735 x-Q. Question repeated? A. No, sir; I couldn't say that we did.

"736 x-Q. Do you *intentionally* make all the higher numbers of six-cord thread "above No. 100 coarser than they would be if made of three-cord? A. *I think "we do, a little.*"

Now, this Hopkins having stated that all thread, whether three-cord or four-cord or six-cord, "*ought to be*" of the same size and gauge—necessarily ought to be if you are selling something to the public to go through a certain eye of a sewing machine needle, or a common needle—yet, on the same page, admits that his company, when they go to work to make this six-cord thread in high numbers, simply for the purpose of saying that they have done so, *intentionally* make it *larger*—intentionally because they *cannot help it.*

THIRD. In the higher numbers above 100 the thread is, in fact, better when made of only three cords than when made of six, for the purposes for which these fine numbers are used. Softness, not strength, is required. But a fine thread, to be made of six cords, has to be very tightly twisted, and is thereby made hard and unsuitable for many of the uses to which these higher numbers are applied.

To this effect is the testimony of *Ives* (p. 107, Q. 12), of *Russell* (p. 120, Qs. 11–13), of *Miller* (p. 188, Re-d. Q. 96), of *H. B. Auchincloss* (p. 82, x-Q. 121), and of *Hopkins* himself (p. 384, x-Qs. 787–798).

No dissatisfaction has been expressed in the trade with the higher numbers of Coats' or any other thread on account of their

being three-cord *(Brightson*, p. 159, Q. 23; *Dallon*, p. 171, Q. 17; and *Frost*, p. 175, Q. 13*)*.

FOURTH. The words "Best Six-Cord," as used in the trade, have come to be a term denoting quality rather than description. It means a certain grade of cotton; namely, the best manufactured, without any particular regard to the number of cords. Thus "Coats' Best Six-Cord Cotton" means the best cotton J. & P. Coats make, whether high or low, and the term, applied to their series of 200-yard spool cotton, means a series of the best cotton made by them, in graded sizes, from No. 8 to No. 200.

Bartley, one of the defendants' own witnesses, testifies to this effect. He says (p. 533):

"124 x-Q. And Clark's O. N. T. and Mile End, in numbers above 100, which "you have stated were less than six cord, in fact, are also called in the trade six "cord, are they not? A. They are.

"125 x-Q. Then, on these higher numbers is not the term 'six cord' a kind "of trade-mark indicating 200-yard spools of these higher numbers? A. It is in "the standard spool cotton which I have mentioned.

"126 x-Q. Do you mean Coats', Clark's O. N. T. and Clark's Mile End? A. "Yes, sir."

So *Brightson* (p. 168):

"104 Re-d. Q. What do the words 'Best Six Cord Spool Cotton' on the label "in the inside of the box marked 'Coats' Three Cord Samples, No. 16,' indicate to "you in the trade? A. Coats' best cotton.

"105 Re-d. Q. And the same is true of the same words on the bottom of the "box, is it? A. Yes, sir; that is the brand complete."

(See also Re-d. Qs. 95–98.)

So *Dallon* (p. 173):

"39 Re-d. Q. What do the words 'best six-cord,' when used in the trade, indicate "as to the grade or quality of spool cotton referred to? A. The witness has de-"layed his answer in order to give a comprehensive idea to the question; the "words 'Best Six Cord,' as applied to J. & P. Coats' spool cotton, simply means "that it was the best spool cotton in the market."

So *Frost* (p. 179):

"53 Re-d. Q. What do the words 'Best Six-Cord' on spool cotton indicate to "you in the trade? A. Indicate that it was as good or better than any cotton "made; spool cotton, I mean, of course—any other spool cotton."

So *Miller* (p. 187), speaking of Coats' cotton:

"76 x-Q. That is why it is called the best, isn't it. A. There is a distinction in "my mind. My understanding is that it is called 'Best' on account of the brand."

FIFTH. The trade in general knew that the numbers of Coats' six-cord 200-yard thread above 100 were, in fact, three-cord, and, therefore, there was no possible deceit in the matter.

Thus, *Ives* (p. 107, Q. 10) states that, to the best of his knowledge and belief, the thread of all the leading manufacturers of spool cotton from Nos. 110 to 200, inclusive, is three-cord in all cases.

And *Russell* (p. 120, Qs. 8–9) states that Clark's mile-end cotton, of Nos. 110 to 200, is three-cord, and the same is true of other manufacturers, as far as he knows.

So *Brightson* (p. 158, Qs. 8–10) testifies that he has always supposed the higher numbers of Coats' 200-yard cotton, above 100, to be three-cord, and never knew any understanding to the contrary in the trade, and that as to the numbers up to 100, he always understood the coarse, medium and medium fine to be six-cord.

And *Dallon* (p. 170, Qs. 6–8) states his understanding that the higher numbers of Coats' cotton were three-cord, and never understood it to be six-cord in the higher numbers, and that this was the general understanding in the trade.

Frost (p. 174, Qs. 7–8) testifies to the same effect.

Miller (p. 181, Qs. 14–16) testifies that he has always understood Coats' to be three-cord in the numbers above 100, and that this is the understanding of the trade; also, that George A. Clark's, in numbers above 100, is also three-cord.

So *Cox* (p. 191, Qs. 15–17) testifies that he has always understood the higher numbers above 100 of Coats' to be three-cord, and that this was the understanding in the trade.

So *Root* (p. 204, Qs. 5–6), testifies to the same effect.

So *Lyman* (p. 224, Qs. 4–5), the head of the notion department of Lord & Taylor, testifies to his knowledge of the higher numbers of Coats' being three-cord.

Some of defendants' witnesses, indeed, say they did not know this fact, or that they supposed the higher numbers of Coats' to be six-cord, because the lower numbers were. This proves nothing more than their ignorance in the trade. It is not sufficient to constitute a fraud, that men can be found ignorant of what is generally known in the trade.

We will not weary the Court with any further evidence on this point. It is clear that the whole series of 200-yard spool cotton, in numbers from 8 to 200, were generally known to the trade as "Best Six-Cord," because that was a characteristic of all the principal numbers of the suits, and that no one was deceived by this term. This is amply sufficient to refute any charge of fraud, on the part of the complainants, on account of using the labels they did on their boxes of thread.

The further opinion of Lord Justice GIFFORD in *Lee vs. Haley*, from which we have just quoted, is especially applicable in this connection. He continues to say (L. R., 5 Ch. App., 155, 158):

> "I will take next the defense that the plaintiffs untruly professed to sell *Wallsend* coal. There again, if the plaintiffs had advertised their coal as *Wallsend* coal, and what they sold had not been anything *known in trade as Wallsend coal*, this Court would have refused to interfere in behalf of persons carrying on such a business. * * * The plaintiffs never professed to sell genuine *Wallsend* coal as the Guinea Coal Company. The *Wallsend* coal referred to in the said circular is *a description of coal known in the trade as Wallsend*.' If the plaintiffs have supplied a description of coal *known in the trade by the usual term Wallsend*, which is not contradicted, there is nothing false in their stating that they secured to their customers their Wallsend coal. That makes an end of these two defenses." (Italics ours.)

So we may say. This second point of the defense is no more creditable to the defendants than is the other; and by the mere fact that such frivolous defenses were put in and pressed, the defendants impliedly admit that they were unable to make a serious reply to the charges of the complainants' bill. They insisted upon it, however, and filled the greater portion of their record with testimony on this very point. It was, therefore, necessary for the complainants to make a reply.

SIXTH. It should be noted, before concluding on this point, that the alleged misrepresentations do not appear in the complainants' trade-mark, or the trade property on which they rest their case, but are altogether independent of them. As bearing on this aspect of the case, we would refer to the judgment of the Court of Chancery Appeals in *Ford vs. Foster*, 41 L. J. (N. S.), Equity, 682. We quote from the head-note of that case :

" The misrepresentation, such, for example, as falsely calling himself a 'patentee,' which will disentitle a plaintiff to relief in equity in respect of an infringement of a trade-mark, must be such a misrepresentation as would prevent him from recovery of nominal damages in an action at law brought to establish his right to the trade-mark, and since a misrepresentation not forming a part of the trade-mark itself, although used in connection with the trade-mark and with the article to which the trade-mark applies, would be no answer to the plaintiff's action to establish his title at law, neither will such a misrepresentation disentitle the plaintiff to relief in equity."

The cases relied on by the defendants to sustain their position are not applicable. In all these cases the fraud was in the trade-mark itself, and went to the very essence of the trade property sought to be protected ; or the trade was a fraudulent trade.

" In *Perry vs. Truefitt* and *Pidding vs. How* there was very good ground for supposing that the trade itself was a fraud. The object of the trader in *Perry vs. Truefitt* was to sell under the description of 'Mexican Balm' some horrid stuff which never came from Mexico at all, but which was puffed up and said to be composed of some extraordinary fine herbs to be got only in *Mexico*. So in *Howard's Tea Case* there was evidence that the object was to persuade the world that the tea was an extraordinary mixture made by some great man in China, when, in point of fact, it was made in England. * * *

" But, where the trade is, as it is in this case, a perfectly innocent trade, and where the trade-mark is, as it is in this case, a perfectly honest trade-mark, I am very clearly of opinion that there is no common law principle upon which it is possible to hold that the fact of the plaintiff having been guilty of some collateral fraud could possibly be an answer to an action brought."

Ford vs. Foster, *supra*, at pp. 691, 687.

See also

Coats vs. Holbrook, Cox Amer. Td. Mk. Cases, 20.
Stewart vs. Smithson, *Id.*, 175.
Fetridge vs. Merchant, *Id.*, 194.
Smith vs. Woodruff, *Id.*, 373.
Hennessy vs. Wheeler, 69 N. Y., 271.

In *Hennessy vs. Wheeler*, the Court said (p. 274) :

"This is, therefore, not a case where it can be said that plaintiffs come to "court with unclean hands and guilty consciences, and must, therefore, be denied "equitable relief. It is not like the cases where the trade-mark is used to deceive "or impose upon the public, or where it is used upon a spurious, worthless or "deleterious compound, or where the business in which it is used is carried on in a "dishonest and fraudulent way."

VII.

Defendants' Witnesses.

The testimony of the witnesses who have been called to rebut particular evidence of complainants' witnesses, has already been considered, in each case, in connection with the witness of complainants, whose testimony they were called to answer. In addition to those, certain witnesses have been called to answer, in a general way, the complainants' proofs and the allegations in the bill.

These are mostly small dealers, and their testimony is essentially of a negative character.

The witnesses referred to particularly are LePard, A. G. Baldwin, G. P. Baldwin, Bartley, Whitmore, Downs and Le Boutillier.

All these witnesses can be classified together.

They all testify, in a general way, that black and gold labels are used by the principal dealers to designate their best thread, and that the spools have upon them the names of the dealers and the number of the thread. That customers generally ask for thread by the name of the maker, which appears on the spools and boxes. That the numbers embossed on the Merrick spools are useful to tell the number of the thread, especially if the paper labels are lost, and that it has not come within their experience that Merrick's has been sold for Coats.' Also that they do not think they would mistake one for the other. Also, in some instances, that they think Merrick's as good as Coats'. Also, that six-cord thread is made of six strands.

It appears by the testimony of these witnesses, more particularly on cross-examination, that Coats' is generally considered the leading thread in the market, and has the largest sale.

(1) *Le Pard* (pp. 502-510) buys Merrick's thread cheaper than Coats' (p. 509, Qs. 86, 87), but he sells Merrick's at retail at the same price as Coats', and thus makes a larger profit on it (Q. 90).

He knows that the numbers above 100, of all makes but Merrick's, are three-cord (x-Qs. 95, 98).

He recognizes the fact that there are such things as trade-marks in the case of spool cotton, even though the spools contain the maker's name (Q. 68, x-Q. 103).

The use of the star by Merrick, embossed on the wood, however, is not regarded as a distinguishing characteristic of their spool (x-Q. 105).

(2) *A. G. Baldwin* (pp. 511-522), on cross-examination, testifies as to selling The American Thread Co.'s thread about 1868 or 1869, upon the spools of which was a black and gold label (x-Qs. 77, 78). These are the old black and gilt labels of the Merrick Thread Co., which they changed, in 1878, to the present form complained of in this suit.

He admits (x-Q. 85) that "Mile End" is a distinguishing trade-mark of Clark's thread, and testifies as follows:

"86 x-Q. What else would be a distinguishing mark, if anything? A. I "don't think of anything at this moment; perhaps the particular label they have "with a little silver interspersed with the gold might be."

He knows of no other spools, except Merrick's and Coats', which have the numbers embossed on the wood (x-Q. 94).

He knows that Coats' thread is a three-cord in the numbers above 100 (x-Q. 102), and thinks Merrick's is also three-cord above 100 (x-Q. 103).

He sells the Merrick thread in numbers above 100 for less than Coats' thread of the corresponding numbers, even though Merrick's is six-cord and Coats' three-cord (x-Q. 100).

(3) *Bartley* (pp. 522–527) is with the well-known firm of Tefft, Weller & Co.; they sold three dozen of Coats' to one of any other brand (Q. 10), and in every part of the country (Q. 12). Their sales of numbers above 100 are only about one-eighth of one per cent. in Coats' thread (Q. 32). In his experience, all the numbers of the grade known as six-cord cotton are bought and sold at the same price (Q. 50). He has known for some time that the higher numbers of Coats' thread are three-cord, and considers that six-cord is "a trade-mark, as far as higher numbers of cotton are concerned."

On his cross-examination, he admits that Coats' stands ahead of the other brands (x-Q. 108); also, that Messrs. Coats and Merrick are the only companies putting embossed numbers on the spools.

Also, that Clark's O. N. T. and Mile-End are not six-cord in numbers above 100 (x-Q. 121), and that the words "six-cord" form a trade-mark indicating 200-yard spools of the higher numbers (x-Q. 125) in the standard spool cottons. He has bought Merrick's cheaper than Coats' (x-Q. 141), and sells it lower (x-Q. 141). He says there is no Orrs and MacNaught thread now sold in the country (x-Q. 143).

(4) *Devin* (pp. 537–547) testifies to substantially the same effect as the other witnesses on the direct.

He has not dealt much in Coats' (x-Q. 86). He can buy Merrick's cheaper than Coats', but sells it at pretty much the same price (x-Qs. 88–90). He encourages the sale of Merrick's in preference to Coats' (x-Q. 99). He cannot testify that all the principal makers use a black and gilt label for six-cord thread (x-Q. 105).

Says the Coats' numbers above 100 are used for a different purpose than the lower numbers (x-Q. 108). He never saw any spools in the trade with numbers embossed on them except Coats' and Merrick's (x-Q. 115).

The Orrs & MacNaught's thread is not now in the market (x-Q. 121). Devin is a very small dealer in spool cotton (x-Q. 135).

(5) *G. P. Baldwin* (pp. 547-556) goes through the regular routine of questions and and answers correctly, like this class of defendants' witnessess.

The proportion of thread he sells in numbers above 100 is only five to ten dozen in each one thousand dozen (Q. 49). He buys Merrick's thread cheaper than Coats' (x-Qs. 73, 74). Says Coats' is a better known thread throughout the country than Merrick's (x-Q. 77). He can buy the numbers of Merrick's above 100 cheaper than Coats' corresponding numbers, as well as the lower numbers (x-Q. 92), and sell Merrick's cheaper than Coats' (x-Q. 93). He believes the Orrs & MacNaught's is no longer in the market (x-Q. 96), and has not seen it for fourteen years (x-Q. 97). He seems to have no definite knowledge as to the fact that the thread of the principal makers is three-cord in numbers above 100.

(6) *Whitmore* (pp. 576-586) testifies that the proportion of thread he sells in numbers above 100 is very small (Q. 20).

He makes the mistake of saying that the embossed numbers appear on the wood in numbers from 8 to 200 (Q. 19). He goes through the regular catechism for defendants' witnesses with substantial correctness, and is of the same calibre as the rest of his class. He has never dealt in Orrs & MacNaught's thread (Q. 50). He buys Merrick's thread for less than Coats' (x-Q. 74), and sells it cheaper (x-Q. 95). He does not know whether Clark's or Willimantic thread is six-cord in numbers above 100 (x-Q. 102). He remembers that the finer numbers Coats' do not have the words "Six Cord" on the labels (x-Q. 107). He thinks it would be an advantage in the Clark's and Willimantic spools to have the numbers embossed on the wood (x-Q. 114).

(7) *Downs* (pp. 586-590) gives the usual answers to the usual questions on the direct.

He cannot recall when he last saw a spool of Orrs & MacNaught's thread (x-Qs. 37-40). He does not use the numbers above 100 (x-Q. 50), and never compared Merrick's with Coats' as to quality (x-Q. 54). He never sold thread at retail (x-Q. 57).

(8) *Le Boutillier* (pp. 624–633) says that he is a dealer who is cutting the ordinary price on spool cotton, for the sake of advertising his business, and is in conflict with the complainants in that respect. His testimony is largely composed of hearsay, and relates to manufacturers not in any way connected with this suit or the parties hereto. He gives the regulation answers in regard to use of raised numbers, gold and black labels, etc.

He has been acting in opposition to the Coats' people (x-Q. 58–59). He declines to answer whether in selling the Coats' thread for four cents a spool he does not make a loss (x-Qs. 60–62). He will not even answer whether he does not sell it for four cents as an advertisement, though he makes no profit (x-Q. 66). He never has known the Coats' people to issue a circular like complainants' exhibit "Combination Notice" (x-Q. 75). His sale of Coats' thread in numbers above 100 is a very small proportion of his total sale (x-Qs. 79, 80). He knows of no spools except Merrick's and Coats' that have the embossed numbers upon the spool heads, and acknowledges that this is "a point of similarity between the two" (x-Qs. 85, 86).

The testimony of all these witnesses, when summed up, amounts to nothing more than what complainants freely admit, namely, that black and gold labels are used, and have been, on six-cord thread. That putting numbers on the wood surrounding the label helps to distinguish the number of the thread, and that there may be dealers who do not know their business well enough to know that numbers above 100 are now, and always have been, three-cord. But their evidence does not, in any way, explain the reason for the change of the Merrick label to the close similarity with Coats', nor for putting the numbers on the spool heads in the peculiar embossed form, instead of printing them or stamping them into the wood, which would be equally useful.

None of these men are consumers or customers, but all are dealers, and in that sense experts, to distinguish between different labels and brands. Of course, no one is called as a witness without

being shown all the spool heads and asked to read the labels, and then, of course, when asked as to similarity, they can testify that they would not be deceived.

The direct examination of all these witnesses shows evidence of careful coaching.

The testimony of *Knox* has already been considered.

The testimony of *Hopkins* has already been considered at length on the various points raised in this brief. It may be added that he is a thoroughly interested witness, and the leading spirit, and one of the heaviest stockholders in the defendant company. His testimony, certainly as to opinions, and even as to facts, must be taken with due allowance from these circumstances. It amounts to this and no more—he never thought of imitating the labels of any other manufacturer, had no such intention in the preparation of the labels used by the Merrick company, and never heard of anybody's ever mistaking the Merrick thread, as labeled, for Coats' or that of any other maker (p. 308, Qs. 100–115). He would, undoubtedly, have gone on building new mills and never have known that he was committing a gross fraud had not the complainants brought this suit to restrain him.

VIII.

Conclusion.

In conclusion, we submit that it has been conclusively established by the proofs and on the authorities cited:

FIRST. That the complainants have a valid trade-mark, and are entitled to protection in the use of the marks, designs and labels which, in combination, give a distinctive appearance to the spools on

which they wind their 200-yard spool cotton in numbers from 8 to 100, and which by years of use and association have come to represent to the public that the spools so marked and labeled contain Coats' best six-cord spool cotton.

SECOND. That the defendants have intentionally and willfully invaded these rights by a simulation of the appearance of the Coats' spools, and have thereby deceived and defrauded the public and unjustifiably injured the complainants.

THIRD. That the defendants cannot excuse their acts of piracy and escape liability for their willful frauds by taking refuge under the expired Conant design patent.

FOURTH. That the counter charge of fraud on the part of the complainants is wholly unfounded and unjustifiable.

For these reasons, we submit that the Circuit Court erred in dismissing the bill of complaint, and that its decree should be reversed, and the cause remanded with the order that a decree be entered granting to the complainants the relief prayed for in the bill.

Respectfully submitted,

FREDERIC H. BETTS,
Counsel.

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Supreme Court of the United States,

OCTOBER TERM, 1892.

No. ~~264~~ 261.

SIR PETER COATS, THOMAS COATS, JAMES COATS, ARCHIBALD COATS, JAMES COATS, JR., THOMAS GLEN COATS, PETER COATS, JR., AND GEORGE COATS,

Appellants,

vs.

THE MERRICK THREAD COMPANY AND HERBERT F. PALMER,

Appellees.

BRIEF FOR APPELLEES.

W. C. WITTER,
W. H. KENYON,
For Appellees.

4116 JOHN POLHEMUS PRINTING CO., 121 FULTON STREET, N. Y.

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Supreme Court of the United States.

J. & P. Coats,
Appellants,
v.
The Merrick Thread Co. *et al.*
Appellees.

In Equity.
No. 261.

BRIEF FOR APPELLEES.

The Nature of the Action,

This is a suit of dual form, for infringement of a trade-mark or for unfair trading by imitation.

The line of goods involved is cotton thread made of six cords or strands wound and sold on spools containing 200 yards, known as **200 yard six cord spool cotton.**

Six cord thread is the best quality of cotton thread manufactured, and 200 yards on a spool is the standard length. Cotton thread of this six cord quality and spooled in 200 yd. lengths and numbered 8, 10, &c., according to its size, forms the staple article known for more than three-quarters of a century from the manufacturer to the consumer as the best spool cotton or best sewing cotton made.

Appellants and appellees are rival manufacturers of this staple article, appellants of Paisley, Scotland, where they have made 200 yard six cord spool cotton for many years, and since 1869 also at Pawtucket, R. I., and the appellees of Holyoke, Mass., where they have made the same article for over twenty-five years.

The Gist of the Complaint.

The gist of the complaint is that the appellees in connection with their old and long used label began in 1878 to emboss

upon their spool heads a numeral expressive of the number of the thread wound on the spool, and continue so to do.

What is the Alleged Trademark or Trade Appearance Sued Upon?

The bill of complaint charges (p. 8, clause thirteenth) the infringement of "the marks, symbols and labels specified in the fifth, sixth and seventh clauses hereof," alleges unfair imitation; and prays (p. 10) for injunction restraining infringement or unfair competition "by simulating the marks and symbols specified in the fifth, sixth and seventh clauses hereof," and for damages for such past infringement, etc.

Clauses five, six and seven of the bill of complaint (pages 4, 5) describes the alleged trademark as the combination, on the end of 200 yard six cord spools of two things, 1, of a "label of concentric rings, having in the central spot a numeral, and," 2, "of an embossed peripheral border of the natural wood, including among its ornamental designs the same numeral as that displayed in the center" of the label.

Clause five of the bill of complaint (p. 4) recites the conception of the idea of this combination in 1869; clause seven (p. 5) recites appellants' commercial use of the "said trademark" as being from 1873 down to the present time, and clause six (p. 4) recites the registration of the same as "a trademark," on Feb. 9, 1875.

Brief History of Appellees' Manufacture.

The Merrick Thread Company, appellee, was organized under that name in 1865. In 1867 or early in 1868 it began and has continued ever since at Holyoke, Mass., to make 200 yard spools of six cord thread and to designate it on one head of the spool with a black and gold label of concentric rings bearing thereon the name, size and quality of the thread. This has been the universal mode of designation of such thread by the trade for more than 50 years, so universal that without such a label it is impossible to market such thread.

A year or two later, to wit, in 1869, the appellants began in this country, at Pawtucket, R. I., to make through the Conant Thread Company, the same article and to designate it on one

spool head with the usual circular black and gold label, the same label they had long used abroad, and on the thread marketed here. For a dozen years these two rival products, as well as the same products of other concerns, and bearing the same kind of label, stood side by side in the market in amity. In 1873 or 1874 the appellants began and have since continued to emboss on their spool head outside of the label a numerical design, patented on April 5, 1870, and owned by them. After this patent expired, to wit, in 1878-9 the appellees applied this numerical design, somewhat changed, to their own spool heads in connection with their own label, whereupon appellants notified appellees of their imagined rights, and then, after waiting some years, brought this suit for, as they claim in their brief, an imitation constituting a case of unfair trading.

Hopkins p. 296, Q. 4, p. 306, Q. 90-95, p. 304, Q. 69–90, 122, 218, 260, R.D.Q. 1019, Knox, p. 422, Q. 6, 7, 10, 13, 15, 49 to 65, 52, 86, 87, 181, 244–9. Le Pard, p. 503, Q. 10–12, 15. Baldwin, p. 512, Q. 16-20. Bartley, p. 522, Q. 74–79. Devin. p. 539, Q. 30–38. Baldwin, p. 548, Q. 13–20. Pierce, p. 560, Q. 38, 39. Whitmore, p. 579, Q. 36–43, 70, 119. Downs, p. 587, Q. 10–14. Wiseman, p. 591, Q. 14–21, 105–108. Fischer, p. 636, Q. 35, 37, 77–80. Root, p. 660, Q. 47–50, 54-xQ. 132. Auchincloss H. B., p. 68, xQ. 46, 58–60. Stacy, p. 116, xQ. 40. Russell, p. 122, Q. 36–42. Miller, p. 182, Q. 29-64. Fischer, p. 636, Q. 35, 36, 37. Farrington, p. 127, Q. 9, 10, 11, 12. Hopkins (recalled), p. 718, Q. 17. Bill of Complaint, p. 2, clauses 1, 4, 5, etc. Hopkins, p. 308, Q. 105. Defendant's Ex. 31, p. 730, and 7th clause, Bill of Complaint, p. 5. Hopkins, p. 309, Q. 116.

Appellees' Use of the Embossed Numeral is the Gist of the Complaint.

The object of this suit is in reality to prevent the appellees from using that patented design although the patent expired in 1877, and although appellees did not begin to use the design until 1878-9, after having in substance previously notified the appellees that they proposed to use it. When charged by legal notice in 1879 with this so called infringement, appellees both by letter and in person asserted their right to use the design and continued the alleged infringement, and no complaint or stop was taken against them for 4 years, when in 1883 this suit was begun.

Prior to the notice of 1879, charging infringement, the appellees had for 12 years and without complaint marketed the thread complained of side by side with appellants' thread and all the time with substantially the same marks and dress; the addition of the patented design to these long used marks provoked the notice of 1879.

See appellees' witness and president Hopkins, p. 311, Q. 136 to 144, and p. 313, Q. 147 to 159.

There is no complaint that appellees infringe in thread numbers 100 to 200, and yet the marks and dress of these numbers of appellants' thread are the same as the numbers 8 to 100 except that this expired patent design is absent from the spools of the higher numbers. Appellees' are the same through the whole line.

See Auchincloss the virtual appellant, p. 75, xQ. 77½, and appellants' witnesses. Stacy, p. 115, xQ. 23, 24. Beale, p. 144, Q. 16, p. 147, xQ. 26, 27. Root, p. 205, Q. 9, p. 654, Q. 12, 13, and p. 656, fol. 1013, p. 659, Q. 44 to 47. Bill of Complaint, p. 6, paragraphs Eighth and Ninth.

I. The offending feature of Appellees marks is the subject of a patent which expired before Appellees used it, and which as a trade mark or appearance is unlawful.

Appellants' patent, pp. 24, 25, was for a

> "*new* design for embossing the ends of sewing thread spools.

Embossed designs on such spools were old and well known for very many years.

The patent states the purpose of the *uew* design to be,

> "to preserve the number of the thread with which the spool is wound after the label has been destroyed, &c."

The purpose is attained as follows, says the patent:

> "Near the outer edge of the head of the spool is embossed in the wood an endless chain of loops *a a* formed apparently by arranging two threads so as to cross each other at regular distances. In the eye of the loop the number of the thread is stamped."

The claim is:

> "The design for ornamenting the ends of sewing thread spools which consists in a chain of loops *aa* within which loops is a number expressive of the number of the thread wound on the spool substantially as shown and described."

Thus the patented design was a "new" design, an "embossed" design, and a design of looped "threads" with the "number" of the thread in the loops.

See also letter of Aug. 12, 1879, charging infringement of this patent, pp. 313, 314.

The utilities of the design are numerous.

The patent mentions the principal utilities, the preservation of the number on the spool, and its ornamental character,

One thing the sewing woman *must* know, to wit, the size of the thread, hence its conspicuous appearance upon the black and gold label on the spool head—hence also its embossment there as a permanent numeral, visible when the label numeral is destroyed, or defaced, or detached.

Mr. Auchincloss the virtual appellant said as to this mark, when asked to state the purpose of the use of all the marks on the spool head, p, 71, xQ. 69.

> "In the case of J. & P. Coats, in which alone I have personal knolwedge the numbers embossed upon the spool heads were placed there for a specific object, namely to preserve the numbers when the labels are defaced by the spindle of the sewing machine."

While protected by the patent in the exclusive use of this design, to wit, on Feb. 9, 1875, appellants registered a trade mark for a combination of the old black and gold label and this patented design in which the latter is described as follows, p. 25:

> "On the end of the spool surrounding the label is a peripheral band of the natural wood embossed with an ornamental design of crossed lines and central stars* with intermediate spaces in which are embossed numerals corresponding to that on the centre of the label."

---

* This is the first appearance of a star in the history of appellants' product, to wit, in 1875. The star is appellees' principal trademark used continuously from 1867, especially at the centre of their black and gold label, and from 1878 in their embossed border; also, appellant's use it on far less than half of their product.

The essential feature of this part of the so called trade mark is described as

"An embossed peripheral border of the natural wood, including among its ornamental designs the same numeral as that displayed in the centre."

Thus the alleged trade mark was a combination of the label with a reproduction of the patented design with its embossed threads crossing each other and its embossed numbers, the star being non-essential, as appears both in the language of the trade mark and in its use upon spools.

This was an attempt to secure as an essential feature of a trade mark the patented design just before the patent expired.

The black and gold label and the numerically embossed border belong necessarily together on the head of the spool, the label at the centre as always, the embossed number on the surrounding periphery. They supplement each other in telling the consumer the thread number which from time immemorial has appeared on that head of the spool where the maker's name is.

For the patent says "the purpose of the design is to preserve the number of the thread" after the number on the label has disappeared.

The three things the consumer cares to know are, in the order of their importance,—

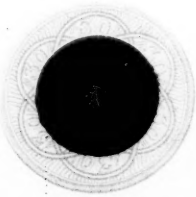
1. The quality of the thread.
2. The thread number or size.
3. The manufacturer's name.

These three designations are ever found together on the same head of spools of all makers. Hence, the embossed number must be on the well known head where the numbered label has been placed and looked for during fifty years.

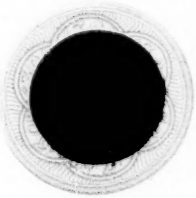
The patented design, the same as it would appear with the long-used labels of the respective parties, and the actual appearance of their spool heads, are here reproduced.

Appellant's Patented Design
Expired April 5. 1877.

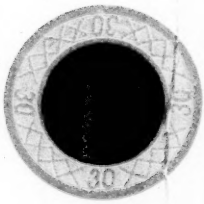
Same when applied to
Appellant's 200 yd. 6 cord
spoolhead.



Same when applied to
Appellees 200 yd. 6 cord
spoolhead.



Appellant's 200 yd. 6 cord
spoolhead as actually used.



Appellees 200 yd 6 cord
spoolhead as actually used.

The design embossed upon appellees' spool heads is the design of the expired patent.

1. It accomplishes all the purposes of the patented design, including its ornamental and utilitarian purposes.

2. Appellants alleged it to be an infringment of the patent in their letter of Aug. 12 and Sept. 17, 1879 (pp. 314, 316).

3. Appellants, in the letter of Aug. 12, 1879 (p. 314), say the "embossed spool head resembles in all respects the spool head of J. & P. Coats," by which they must have meant that the substitution of appellees' proprietary star for the crossed threads was an immaterial change.

4. The embossed numeral was the valuable and essential thing and the use of it by appellees produced this litigation.

II. Appellees' use of the numerical embossment was openly and rightfully made.

1. It was not begun till the patent for it had expired (Hopkins, p. 309, Q. 116, 143.)

2. Appellants were notified of Appellees' purpose to use it (Hopkins, p. 312, Q. 138.)

3. After notification of infringement (*sic*) Appellees did not deny using the design but asserted their right to use it, both by letter and personally. (Dfts. Exhibits Nos. 32, 33, 34, p. 313–316, Hopkins, 317, Q. 156–7.)

4. Appellees applied to it their own long used trade-mark, a star, and omitted the crossed threads. (See Dft.'s Spools, Hopkins, p. 309, Q. 118.

5. They used it in its appropriate place, the place designated for it by the expired patent.

6. **The legal authorities more than justify this use. Appellees might lawfully have used it exactly as Appellants have used it.**

After the expiration of the Singer patents the public had a right to use the inventions patented and furthermore to mark their machines "Singer." To seek to enjoin the use of even the name "Singer" after "Singer" had come to designate a construction was an attempt

> "After the expiration of one or more patents to perpetuate a monopoly under the guise of a trademark." Singer Co. *v.* Stanage, 6 F. R., 279; Singer Co. *v.* Riley, 11 F. R., 706.

The use of the embossment by Appellants was a use exclusive only by virtue of the patent. If their spools had thereby become known as "Coats" and the Appellees had, in addition to using the design, called the spools "Coats" they would still have been justified. As stated in Brill *v.* Singer Mfg. Co., 41 Ohio, 127:

> "It would be a poor return for the exclusive privilege which the public gives for a long period to the patentee if after the expiration of his patent he shall be allowed to virtually perpetuate his monopoly, in a measure by preventing all others from using the name which will describe and make known the invention that has become dedicated to the public."

Appellants' design never, however, came to have any such capacity, and yet, appellants are seeking to stop the use of the *very patented invention itself*, which is as though The Singer Co. should seek to claim that the very construction, for example, of the expired patented feed motion was a trade mark, and that, therefore, that feed motion must not be used in other machines, because they would be taken for Singers.

In the Willcox & Gibbs Co. *vs.* Krause, 3 N. Y. State Rep., 590, plaintiff sought to enjoin the use of designs for sewing machine frames, legs and treadles, the patents for which had expired.

> "The question for this Court seems to be whether plaintiff is entitled to protection in the use of the G frame as a trade mark. *It is a well settled principle that whatever is patented becomes free to the public at the expiration of the patent.* See *Grant et al.* v. *Raymond*, 6 Peters, 243. The plaintiffs' rights are under these patents and have expired with them; citing *Singer Mfg. Co.* v. *Riley*, 11 Fed. Rep., 706, and *Brill* v. *Singer Mfg. Co.*, 41 Ohio, 127–141. *The present case is stronger than those above referred to because the G frame itself was protected in the patents which have expired.*"

So in the case at bar, the embossing of a peripheral border of the natural wood of the spool head with a numeral repeated at intervals and expressive of the number of the thread on the spool, is the very thing patented in the Design Patent of 1870; and so it is free to all to be used since the expiration of that patent, and any effort to practically continue the monopoly on any one or more lines of goods under the guise of a trade mark, falls under the ban of the law as expressed above.

And the position, that it is the *combination* of this embossing with the old Coats label that, all taken together, constitutes the trade mark infringed does not help appellants' case; for that is practically to continue the monopoly (secured by the design patent) on that line of goods on which that label is used, to wit, on 200 yard six cord thread, and it is the same argument as was used by the plaintiff in *Brill* v. *Singer Mfg. Co.*, 41 Ohio, 157 (*supra*), where the plaintiff had a trade mark consisting of a brass oval having on it the words, "The Singer Mfg. Co., N. Y., Trade Mark," and also the representation of a shuttle, and sued to enjoin the use of the word "Singer." The Court said:

> "The plaintiff has sought by blending the name 'Singer' with the trade mark, to perpetuate its property. But a trade mark cannot be made a guise for extending the monopoly of a patent."

Appellees' design never served any purpose except to designate permanently the size of the thread and to ornament the spool head; says the same case of Brill *vs.* Singer Co., above cited, 41 Ohio, 127.

> The plaintiff has sought, by blending the name "Singer" on the trade mark, to perpetuate its property. But a trade mark cannot be made a guise for extending a monopoly, citing again *Singer Mfg. Co.* v. *Riley, supra.* While there may be a similitude in the form and finish of the machines of the parties hereto, "we think there should not have been an injunction" against defendants "introducing machines to the public in the habiliments which they saw fit to adopt. Where machines, during the time they are protected by a patent, become known and identified in the trade by their shape, external appearance or ornamentation, the patentee, after the expiration of the patent, cannot prevent others from using the same modes of identification in machines of the same kind manufactured and sold by them," citing *Fairbanks* vs. *Jacobus*, 14 Blatchf., 337.

In *Gally* v. *Colts Mfg. Co.*, 30 F. R., 118, the name "Universal" was shown to have been adopted during the life of a patent to designate the printing press covered by the patent, and it was held by Judge *Shipman* that the exclusive right to use this name expired with the patent, citing *Filby* v. *Child*, 16 Blatchf., 376; *Singer Mfg. Co.* v. *Stanage*, 6 Fed. Rep., 279; and *Gray* v. *Taper Sleeve Pulley Works*, 16 Fed. Rep., 436.

In *Lorillard* v. *Pride*, 28 Fed. Rep., 434, 438, the effort was, under a claim of trade mark, to monopolize, as a means

of indicating plug tobacco, the tin tag of an invalid patent. Judge *Blodgett* said:

> "It also appears that the complainants' first effort was to secure to themselves the exclusive right to the use of tin as a badge of their goods by means of the Siedler patent, and that their goods acquired the name "Tin Tag" goods while they were acting under their patent, and that it was not until their patent had been held void that they fell back upon their right to use tin as a trade mark. Having adopted this use of tin, and given to their goods the name of "Tin Tag Tobacco," while they were claiming the rights given them by the patent, it seems to me they have no right now to perpetuate a monopoly which the courts decided they could not have, by falling back upon the popular name given their goods marked in pursuance of the patent. If their goods properly became known and designated in the market as "Tin Tag" goods, by virtue of their marking them or tagging them in pursuance of their patent, the right to so indicate or mark the goods became public when the patent expired, or was declared void, and they cannot perpetuate or continue this right by claiming it as a trade mark."

In *Willcox & Gibbs S. M. Co.* v. *The Gibbens Frame*, 17 Fed. Rep., 623, suit was brought to restrain the use of frames in sewing machines in the shape of the capital letter "G," a design patent for this feature having expired in 1867. Complainant registered this form of frame as a trade mark in 1881. The frame had some advantages over other frames, as described in the patent for it. The Court, in dissolving an injunction, said:

> "At common law this form was open to everybody, and, but for the exclusive use conferred by the patents, it might have been employed by others so extensively that the employment of it by the orators would not have amounted to any representation at all, that machines having it were of the orator's make. The exclusive right of the orator, up to the time of the expiration of the patents, appears to have rested upon the patents, and not upon any right acquired independently of the patents. All rights acquired under the patents expire with them.
>
> * * * * * * * * *
>
> "It is claimed that as the orator's machines are somewhat known by this frame and other shapes easily distinguishable from this might be equally useful, some of which in hexagonal or octagonal instead of circular shape are suggested, the defendant should use some of these. But those doubtless would have been infringements of the patents and the style used is as much freed by the expiration of the patent as those are. All the effect which these frames have in representing the machines to be those of the

orator appears to be due to the monopoly enjoyed under the patents; and to give the orator the benefit of the effect by calling the frame a trade mark would continue the monopoly indefinitely, when under the law it should cease."

In *Singer Mfg. Co.* vs. *June Mfg. Co.*; 41 F. R., 208, the rule deducible from all the Singer and other cases is thus stated by Judge Blodgett:

"If the manufacturer of a patented machine adopts a peculiar style or form in which to embody the working mechanism covered by his patents, or any special mode of ornamentation to make the machine attractive and salable, such form of construction and ornamentation, although not strictly essential to the operation of the mechanical device covered by the patents, still becomes a part of the machine as presented to the world on the expiration of the patents. It goes to the public in the dress and with the features which have been given it by its manufacturer under the patents. It is presumable that an intelligent manufacturer, wishing to secure a large sale for a mechanical device of which he has a monopoly, especially in a machine of the kind under consideration, which has become a part of household furniture, used his best skill and taste as a constructor to make the machine convenient and attractive, so as to give the best possible embodiment of his patented mechanical devices; and, as I have already said, this dress, thus given to the machine, becomes a part of it, and the public, when they have the right to use the patent, have the right to use the dress in which the patentee clothed it. Hence any sewing machine manufactured by another person, after the expiration of the patents, upon the principles covered by the Singer patents, may be a perfect imitation of the machines which the complainant or its predecessors manufactured under their patents. It does not lie in the mouth of the complainant to object to the close imitation or similarity which the defendant's machines may bear to those made by the complainant. It is the misfortune, perhaps, in a certain sense, of the complainant, if it continues to manufacture Singer sewing machines of the style originated by it, that others may also manufacture machines which look, as well as operate, so nearly like those of complainant as that it may take a person of experience to tell the difference between them, aside from the name or trade mark of the manufacturer thereon; but the fact that this right of others may embarrass the complainant's business is only a consequence following the right of the public to make and use, without tribute to the patentee, machines which have in their mechanical principles and forms of construction become public property. It would be a dangerous doctrine to concede that a patentee who has invented a machine which has gone into extensive public use can, after the patents have become public property, still prevent the public from having the benefit of the invention until they devise and adopt some new form of construction from that adopted by the manufacturers under the patents, and create a new reputation for their machine. I am, therefore, clear

> that the claim set up by complainant to the exclusive use of the word "Singer" as a trade name, and to the exclusive right to the mode of construction, external shape, appearance and ornamentation adopted by the complainant while the patents were in force for its "New Family Singer" and "Medium Singer," is not well founded and should not be so held as a matter of law upon the proofs in this case."

In Tucker Mfg. Co. *v.* Boyington, 96 G., p. 455, defendant was held justified in using same colored label as complainants and, moreover, in using complainants' diagram of a spring bed and the words "Tucker Spring Bed," because the patent for the bed had expired, and complainants' use of those two marks had grown up under the patent. Complainants associated with these two marks their monogram, but defendant did not use that. Judge Blodgett said:

> "The defendant had the right to use a diagram of the spring bed as common property and it has been such since the expiration of the Tucker patent." And
>
> "He had the right to designate it as the 'Tucker Spring Bed,' indicating that it is manufactured under the Tucker patent, and that he has also the right to put any colored label upon it he choose, so long as he does not by his label indicate that it is the manufacture of the Tucker Mfg. Co.
>
> "There is no patent trademark upon the color."

If the position of appellants is sustained, the result will be to perpetuate in them for all time on 200 yard six cord spool cotton the monopoly enjoyed during their ownership of the expired 1870 design patent.

The design of that 1870 design patent could not be employed by any existing manufacturer of 200-yd. 6-cord spool cotton without approaching in the resulting general appearance of the spool head, as nearly to appellants' goods as do the appellees.

Every manufacturer of 200-yd. 6-cord thread does and must employ a *label* on the spool head. The custom of more than half a century makes it imperative. A 200-yd. 6-cord cotton attempted to be put upon the market without a label would be suspected of being 3-cord or basting cotton, and would be unsalable at the 6-cord price.

Every manufacturer of 200-yd. 6-cord cotton does and must employ a *label of concentric rings.* The custom of more than half a century makes this also imperative.

Every manufacturer of 200-yd. 6-cord cotton does and must employ a *label of concentric rings having a conspicuous numera*

expressive of the number of the thread. This is equally imperative. Coats' label has the numeral at the central spot. All other manufacturers' labels, including appellees', have the numeral at the side of the label.

Every manufacturer of 200-yd. 6–cord cotton does and must employ a label that is *essentially black and gold in color.* This is equally imperative. A 200-yd. 6-cord cotton, attempted to be put upon the market with a label of any other general color effect would be, has in fact been, suspected of being 3-cord or basting cotton, and is practically unsalable as six cord. Three cord, or basting cottons have all sorts of labels, but always of a different color effect from the *black and gold* which universally characterizes and identifies in the eyes of consumers the genuine 200-yd. 6-cord spool cotton. One or two disastrous attempts of this kind are spoken of in the proofs.

A short time ago the Kerr people undertook to put a 200-yd six cord thread upon the market of this country without a black and gold label, and upon a spool different in shape from that universally used, but they had to abandon the project, and have recently returned to the old customs, and now wind that thread upon spools of the usual size and shape, bearing the usual black and gold label.

See Farrington, p. 127, v. 10 to 12; Hopkins, p. 718, q. 17.

A well known English maker named Chadwick has still more recently undertaken to put his thread upon the market in the country, but while using the customary shape and size of spool he does not employ a black and gold label, and the testimony shows that he is not gaining headway, but losing ground, and that the retailer cannot market the Chadwick thread with the consumer for the reason that the consumer thinks it is basting thread, or three cord thread, because it does not bear a black and gold label.

See Fisher, p. 636, q. 35, 36, 37.

To illustrate the rigidity of these customs and usages attention may here be called to the fact that the Merrick spools, especially in the numbers most used, 40, 50, 60, are decidedly longer than the other makes, and that greater length being a

feature of 3-cord or basting cotton spools, has formed an obstacle to the introduction of the Merrick thread.

See Hopkins, p. 323, q. 192 to 197; Le Pard, p. 506, q. 60 to 65 and 104 xq.; Sears, p. 96, q. 13, 14.

See also Knox, p. 422, q. 6; p. 478, xq. 371, 378.

State of the Art.

Every manufacturer of 200 yard six cord thread does and must employ on the label the words, "*Best Six Cord*" or words of like import. Half a century of general usage has made this also imperative. No thread could be sold, except perhaps as three cord or basting thread, that did not have these or equivalent words on the label. Appellants' label shows these words in an outer circle, and printed in large black letters on a gold ground. The labels of most of the other manufacturers (including appellees' label) show these words in an inner circle, and printed in small gold letters on a black ground.

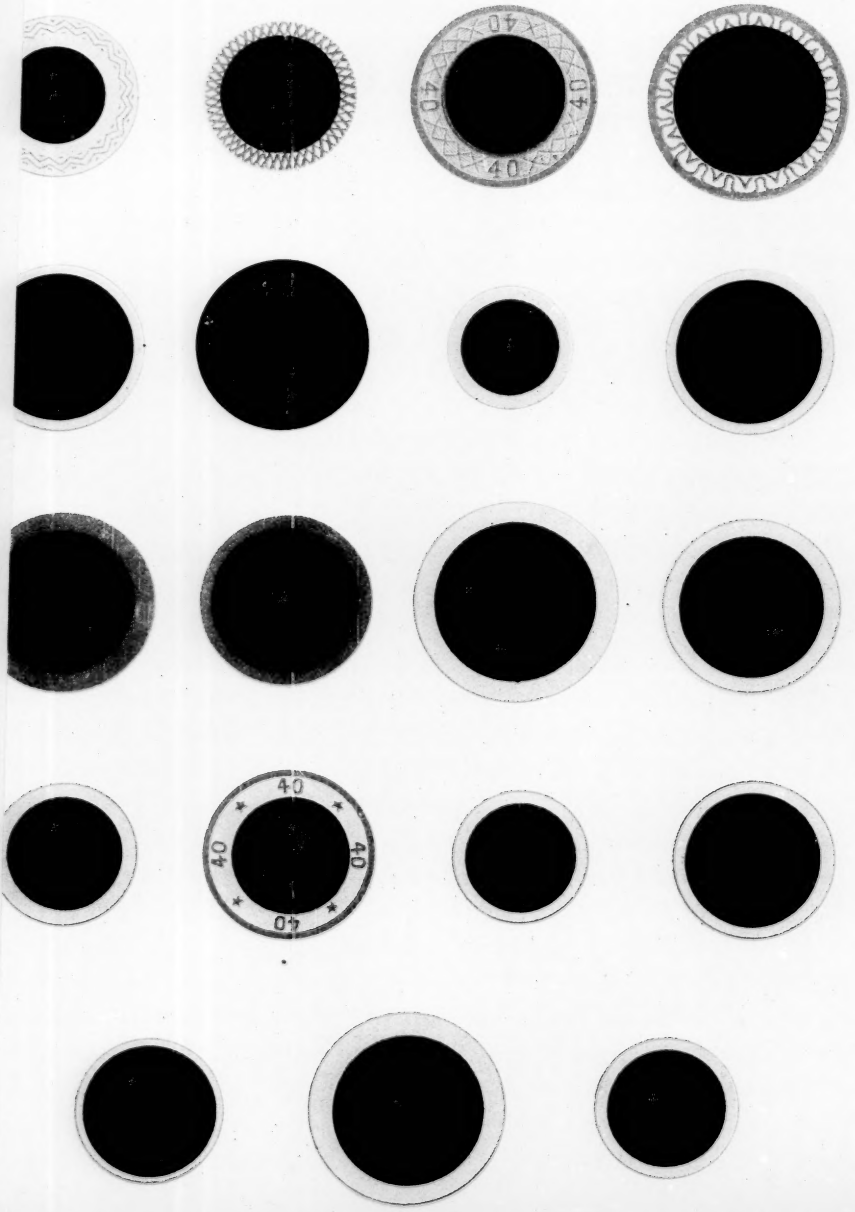
Every manufacturer of 200 yard six cord cotton does and must employ on the outer circle and most conspicuous part of the label its own name, to wit, respectively, "Merrick Thread Co.," "J. & J. Clark," "J. & P. Coats," "Willimantic Linen Co.," "George A. Clark," "John Clark, Jun'r, & Co.," "Orrs & McNaught," "Kerr & Co.," and many others. Without such name the cotton would be unsalable, except perhaps as three cord thread. For it is the universal practice, and is conceded by appellants' witnesses to be so, for consumers to ask for and to recognize the thread they want by the *name* of the manufacturer, as for instance, Coats', Merrick's, Willimantic, George Clark's, or Clark's O. N. T., John Clark's, or Clark's Mile End, Orrs & McNaughts', etc.

Every manufacturer, including appellants, of 200 yard six cord thread (*excepting only the defendants herein*) employs also the words "200 yds." on the black and gold label. The defendants employ those words on the white and blue label at the reverse end of the spool (as words of minor importance) instead of on the black and gold label.

All of these manufacturers have used these respective labels on the heads of their spools of 200-yd. six cord thread for a great many years; that is to say labels.

1. Black and gold in color.

Six cord 200 Yards labels have
ways been Black and Gold as follows:



2. These colors arranged in concentric rings.
3. The name in the outer ring.
4. The words "Best Six Cord."
5. The number indicating size of thread, as "8," "50," etc., and "200 yds.," all in black and gold.

And all of them use other and wholly different labels and marks on all their other lines of threads, for example, on threads of that same quality, put up in different lengths, and especially on 3-cord or poorer quality threads, however put up.

Under these circumstances, if any one of all these manufacturers of 200-yd. six cord thread should adopt on that line of thread the exact design shown and claimed in the 1870 design patent, the result would necessarily be in every case a spool head resembling appellants' spool head just as nearly as appellees' does, and in two or three, if not all, of the instances, more nearly.

No manufacturer can afford to discontinue the use of, or radically change, the label that has thus become identified with such goods, especially where the change of label, to be effectual, from appellants' point of view, would make the goods practically unsalable for first quality goods.

For appellants to prevail, therefore, in this cause, would be for this Court to perpetuate in them for all time on first quality cotton thread for household use the monopoly secured to them for seven years on all lines of thread by the Design Patent of April 5, 1870.

To clinch this matter we respectfully direct the attention of the Court to a detailed comparison hereinafter made (to wit, at page 24 *infra*) of the various labels that are and have been used on 200 yard six cord thread in this country and that have become familiar to the purchasing public, so far as they are within the memory of witnesses now living, including a comparison of appellants' and appellees' thread. And for this purpose the Court is asked to refer to "Defendants' Exhibit No. 48, Chronological Exhibit of Thread Manufacturers," and there examine the spools themselves, in connection with the part of the Brief referred to.

In conclusion of this defense based on the 1870 design patent (which is a complete defense to the entire action), we call the attention of the Court to the wording of the bill of complaint, particularly in clause third, p. 3, where "*designs*" are specifically included along with labels and marks that are alleged to have become identified with J. & P. Coats thread as distinguishing and indicating that thread, and to be so recognized by purchasers. This allegation manifestly refers to the *embossed design* used on Coats' 200 yard six cord thread, as recited in the fifth, sixth and seventh clauses of the bill.

Now, it is just this embossed design which was the thing patented in the 1870 design patent; and at the expiration of that patent the subject matter of the patent was free to all to be used, even if it were true (which it is not) that in the meantime the design had become identified with Coats' thread and to some extent distinguished and indicated that thread, and was so recognized by purchasers. For the cases *Brill* v. *Singer Mfg. Co.*, 41 Ohio, 127; *Fairbanks* v. *Jacobus*, 14 Blatchf., 337; *Singer Mfg. Co.* v. *Riley*, 11 Fed. Rep., 706, referred to above, hold that not only the subject matter of the patent belongs to the public domain, but any name, appearance or designation that grew up along with the exclusive user equally belongs to the public.

III.—The appearance of Appellants spool head cannot constitute a lawful trade mark because in all its features it is a descriptive and useful device, used by Appellants, and by Appellees alike, solely for that reason.

FIRST THE EMBOSSMENT (WHICH IS THE GIST OF THE WHOLE MATTER) IS FREE TO BE USED BY ANYBODY BECAUSE DISCRIPTIVE.

The embossed *numeral* is *descriptive* of the size of the thread wound on the spool, and varies from spool to spool as the thread on the spool varies.

The *embossing* of the numeral is *mechanically useful*, being a permanent record of the size of the thread wound on the spool, better adapted to the ordinary usage of a spool of thread than any other way of marking the number of the thread ever devised.

The expired design patent of 1870 said, p. 24:

> "The purpose of the design shown in the drawings is to preserve the number of the thread with which the spool is wound after the label has been destroyed by the act of setting the spool upon the spool stand of a sewing machine."

The bill of complaint alleges, p. 4:

> "*The aim and object of embossing said numerals on the edge of the natural wood, as foresaid, was* **partly** *to show the number of the thread in case the paper label containing such number should be defaced or removed,* and also to give a distinctive appearance to plaintiffs' spools, etc."

The evidence on both sides is concurrent and is shown in the following references:

Mr. *Auchincloss* (virtual Appellant) says: p. 71, xQ. 69.

> "In the case of J. & P. Coats, in which alone I have personal knowledge, the numbers embossed upon the spool heads were placed there for a specific object, namely, to preserve the numbers when the labels are defaced by the spindle of the sewing machine."

See also Appellants' witness *Belfield*, general superintendent of Appellants' manufacture in this country, (xQ. 26–31, p. 44–45.)

1. Embossing is more ornamental and legible than stamping.
2. The repetition of the numeral in the embossing makes it convenient to read the number from any point of observation—there is always a numeral that is right side up to the eye.
3. The ornamental details of the embossing between the numerals hold the tool which does the embossing and prevent its slipping between the numbers.
4. They facilitate the accurate centering of the paper label in the pasting on of the same by making a small circle for the label, so that the finished spool looks better.
5. They also add beauty to the design.
6. The star proclaims the thread as appellees.

Hopkins, p. 309, Q. 112, 113, p. 323, Q. 190, 191.
Hopkins, p. 309, Q. 116, 119.

Appellees have used the embossment on their 200 yard six cord thread in the way they do for the purpose of securing the advantages above enumerated of the design of the expired 1870 patent.

Appellees have an adequate and lawful reason for the use of every feature of their spool head.

Mr. *Hopkins*, President of Appellee Company, testified as follows as to the reasons for using the features of the embossment, p. 309:

> "116 Q. State when you began to emboss the numerals in the wood around the rim of the 200 yard six cord spools, as shown in Complainants' Exhibit Schedule G?
>
> A. In 1878, or the early part of 1879.
>
> 117 Q. Why did you do this?
>
> A. We did it to preserve the number of the thread when the ticket became defaced or lost off, or destroyed on the sewing machine; that was the first and main reason; then we had another reason, viz., to make a smaller circle so that the ticket could be placed

nearer the center of the spool and true; and another reason was, so that a person could tell the number of the thread in any position in which he held the spool.

118 Q. What were your reasons for putting the embossed star between the numbers on the periphery?

A. When we had the gnarls first made to do that work, they were made perfectly plain, except the figures; we tried them for a short time and found that they slipped, as there was so much smooth space on them, and destroyed the figures; our mechanic, Mr. Page, said that we must have a bearing between the figures in order to make the gnarl work; I told him he could have some cut with the star between the figures which would make another bearing, as we had always had the star in the center of our ticket; he had them so made and they have remained so to this day; there has been no other change; this is on the 200 yard six cord thread.

119 Q. What information are the numerals intended to convey, and what information do they in fact convey to the trade and to the public, whether the numerals appear on the label or on the wooden periphery of the spool, and whether they appear upon one make of thread or another?

A. They describe to the person the size or number of the thread wound on that spool."

The cases are clear to the effect that where, under the name of trade mark, a claim is made which, if sustained, will perpetuate a monopoly in a useful device or ornament or in a description that all the world should have the right to use and enjoy, the claim will not be sustained.

In *Willcox & Gibbs* v. *Kruse & Murphy*, 3 N. Y. State Rep., 590, which was a suit for infringement of an alleged trade mark in the G-shaped frame of a sewing machine, the patent for which had expired, the court said:

> "We" concur with the lower court in finding that "the G frame has certain mechanical advantages," and that the proof has shown it to be an essential part of the machine. "*To hold that a trade mark may be acquired in a useful mechanical structure would be in conflict with all authorities.*"

To same effect is *Willcox & Gibbs S. M. Co.* v. *The Gibbens Frame*, 17 Fed. Rep., 623.

In the case at bar every part of the Appellees' embossment is ornamental and descriptive and useful, and hence it cannot be monopolized by anyone under the name of a trade mark.

In *Lorillard* v. *Pride*, 28 Fed. Rep., 434, complainants sought to restrain the use by defendant of a *tin* tag, whatever its appearance, color, or shape, as a label for plug tobacco, after a patent for embedding a metallic tag into the surface of

a plug of tobacco had been declared void and they had registered a trademark for it. Judge Blodgett, in holding for defendant, said:

> "I think there can be no doubt, from the proof, the complainants were the first to attempt the use of tin as a special mark to indicate and designate their manufactured goods. * * * It seems as reasonable to assume that the complainants could have adopted paper, or wood, or a piece of cloth or leather. * * * That they had a right to appropriate to their exclusive use a piece of tin, without regard to its color, shape, or the characters or letters it bears, does not seem to me to be within the scope and purpose of the law of trade mark. * * * But if the public has been imposed upon, or the goods of others have been sold as the goods of complainants, to the damage of complainants, it is because complainants were unfortunate in the selection of a designation for their goods, and made their claim to the use of tin as their trade mark more broadly than the law will permit. * * * A person may appropriate any word, figure or emblem as a trade mark, but that does not give an exclusive right to the use of the well known material substances upon which the word, figure or emblem may be impressed or engraved."

The tin tag being useful and permanent and ornamental on plug tobacco, its exclusive use was secured by a patent. Precisely as in the case at bar a design patent was obtained founded on the useful and ornamental value of the embossing. In the case at bar, as well as in the case of *Lorillard* v. *Pride*, the appropriation to exclusive use of the devices attempted to be appropriated

> "is not within the scope and purpose of the law of trade mark."

In *Fairbanks* v. *Jacobus*, 14 Blatchf., 337, injunction was sought to restrain defendant from making and selling an imitation of Fairbanks' scales and from the use of the words "Fairbanks' Patent," after the patents had expired. Judge *Johnson* said:

> The alleged invention, as claimed by plaintiffs, is that the scale complained of, as to the iron castings entering into its structure, was made by using corresponding parts of a scale made by plaintiffs to form the moulds for those castings, and that the general shape and arrangement, as well as the color and external appearance, are imitated from the plaintiff's scale so nearly that only an expert in scales could distinguish the difference between them.
>
> "Exterior form, painted color, and such non-essentials, were not and could not be the subject of the patents, and did not and could not secure these to the plaintiffs. Much less could these be secured

as a trade mark." An invention of structure or of design can be secured by patents. "Apart from these, anyone may make anything in any form, and may copy with exactness that which another has produced without infliging any legal injury, unless he attributes to that which he has made a false origin, by claiming it to be the manufacture of another person. Any other doctrine is impossible to be maintained; for, otherwise, all the colors, all the unessential forms, could be monopolized as trade marks, and exclusive rights would be created, not limited in time, as patents are, founded upon no public utility, and subject to no control but the will of the adopter." Citing *Amoskeag Co.* v. *Spear*, 2 Sandf., S. C. R., 599; *Gillott* v. *Esterbrook*, 47 Barb., 455; *Newman* v. *Alvord*, 49 Barb., 588.

The words "Fairbanks Patent" are either intended to deceive the public as to the manufacture of defendant's goods, or are intended to indicate that the scales are made in accordance with the expired Fairbanks patent. In the latter case they are free to all the world.

In *Amoskeag Mfg. Co.* v. *Trainer*, 101 U. S., 51, it was held that the letters "A. C. A.," although there was some testimony that these letters were intended to indicate origin, did not constitute a valid trade mark because they indicate the *quality* of the goods to which they were applied.

So here, the embossing indicates in an ornamental and useful way the *size* of the thread wound on the particular spool to which it is applied, but it does not at all indicate the origin of the goods. That latter office is fulfilled, thoroughly and exhaustively, by the names "*J. & P. Coats*" and "*Merrick Thread Co.*," which appear conspicuously on *every spool* manufactured by the respective parties; just as in *Amoskeag Co.* v. *Trainer*, the words "Amoskeag Mfg. Co." appeared conspicuously on every piece of goods, along with the words "A. C. A." and so told the origin of the goods.

Says the Supreme Court in that case, very pertinently to the case at bar in almost every detail (11 Otto, p. 51.):

"It is clear from the history of the adoption of the letters A.C.A. as narrated by the complainant, and the device within which they are used, that they were only designed to represent the highest quality of ticking which is manufactured by the complainant and not its origin. The device previously and subsequently used, stated the name of the manufacturer, and no purpose could have been subserved by any further declaration of that fact.

* * * * * * * * * *

"We are aware that there is in the record the testimony of several witnesses to the effect that they understood that the letters were intended to indicate the origin as well as the quality of the goods to which they were attached, but it is entirely overborne by the

patent fact that the label previously disclosed the name in full of the manufacturer and by the history of the adoption of the letters as narrated by the complainant. As it was pertinently observed in Sanford, if purchasers of the ticking read the name of the company, the letters can give no additional information, even if it be admitted that they are intended to indicate the name of the company. And, if they do not read the name as printed, the letters are unintelligible. If an explanation be asked of their purpose in the label, the only reasonable answer which can be given is the one which corresponds with the fact that they are designed merely to indicate the quality of the goods."

In *Delaware & Hudson Canal Co. v. Clair*, 13 Wall, 311, complainant sought to uphold the geographically descriptive word "Lackawanna" as applied to coal as a trade-mark for coal on the ground that it had come to indicate origin; that the coal was their coal. There had been an exclusive user but not as here under a patented design. The defendant was benefited by the use of the name.

The Court held in substance that as the words did not originally indicate origin and were geographically descriptive, it was immaterial that they had come by use to indicate origin. The Court said:

"True, it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth. * * * * We are therefore of opinion that the defendant has invaded no right to which the plaintiffs can maintain a claim. By advertising and selling coal brought from the Lackawanna Valley as Lackawanna coal, he has made no false representation, and we see no evidence that he has attempted to sell his coal as and for the coal of the plaintiffs. If the public are led into mistake, it is by the truth, not by any false pretense. If the complainants' sales are diminished, it is because they are not the only producers of Lackawanna coal, and not because of any fraud of the defendant."

It is not made out that the embossed numeral either originally indicated origin or ever came so to do nor that purchasers have in a single instance been mistaken or deceived by any resemblance. But, if all three of these things were true still the Appellants could not, under the authority of the cases, enjoin Appellees from its use, for the embossment is descriptive of

the size of the thread and is a justifiable and an adequate reason for its use, irrespective of its being the subject of an expired patent.

In Wotherspoon *v.* Currie, L. R., 5 H. L., 508, the defendant was enjoined from using the geographically descriptive term, Glenfield, but

1. Glenfield was merely an estate, not even a Post Office-address.

2. Glenfield was the name and the *only* name of Complainant's starch.

3. Glenfield, as descriptive of Complainant's starch, had come by association to obliterate its semi-geographical meaning.

4. Defendant's agents sold their starch as "Glenfield Starch."

5. There was no adequate reason for defendant's use of the word "Glenfield" except piracy.

> *Lord Westbury said "I take the whole proceedings of the respondent from the beginning to the end to be nothing in the world more than a contrivance for the purpose of getting the word "Glenfield" associated with its manufacture."*

On the contrary the embossment never was or came to be the name or means of recognizing the thread. Its name was ever Coats, plainly appearing within the embossment on the label. Appellees' agents never sold their thread as Coats or called it Coats or the embossed thread or sought to get any such name associated with their product.

In *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 31 F. R., 776, it was contended that the mark "L. L." did not merely indicate quality, but also in part origin. So the Bill of Complaint here alleged that

> "The object of embossing said numerals * * * was **partly** to show the number of the thread in case the paper label containing such number should be defaced or removed, and also to give a distinctive appearance * * * and so indicate origin," &c.

But the judge who heard that case at the Circuit justly held that even were such the evidence and the fact, public and private right could not be thus blended. Said the Court, to permit this

> "would be a strange anomaly in the law and would lead to inextricable confusion. Where origin and ownership is otherwise indicated, as by the use of the manufacturer's name, then the symbol mark or device which is intended to designate grade, class or

quality cannot properly be also employed to denote origin or manufacture and thus confer exclusive right to its use."

The case was affirmed by this Court, 138 U S., 537, and the Court said:

"There was some evidence tending to show that it was understood that the letters were used to indicate origin as well as quality, but it was considered to be entirely overborne by the disclosure of the name of the manufacturer in full and the history of the *adoption* of the letters to designate quality only, as narrated by complainant."

So here, (1) the maker's name on every spool, box, package and circular obliterates the embossment as a means of indicating origin; (2) the evidence of the embossment indicating origin is of the feeblest or absent; (3) it is descriptive only; and (4) Appellants' temporary exclusive use of it was under a patent and Appellees' use began after the patent expired.

SECONDLY. THE COMBINED LABEL AND EMBOSSMENT (EXCLUDING THE NAME) DOES NOT INDICATE ORIGIN, COMPRISES NO FEATURE OF A LAWFUL TRADE MARK AND IS FREE TO BE USED BY ANYBODY.

A circular black and gold label of concentric rings with name, number, quality and length of the thread marked upon it, has been the badge of six cord 200 yard thread from its first importation into this country more than sixty years ago.

See Hopkins, p. 304, q. 69 to 90, *122*, *218*, *260*, xq. 1019. Knox, p. 422, q. 6, 7, 10, 13, 15 49 to 65, rdq. *52*, *86*, *87*, xq. 181, 244-9. Le Pard, p. 503, q. *10* to 12, 15. Baldwin, A. G. p. 512, q. *16* to 20. Bartley, p. 522, q. *74* to 79. Devin, p. 539, q. *30* to *38*. Baldwin, G. P., p. 548, q. *13* to 18. Pierce, p. 560, q. 38, 39. Whitmore, p. 579, q. *36* to 43, 70, 119. Downs, p. 587, q. *10* to 14. Wiesmann, p. 591, q. *14* to 21, 105–8. Fischer, p. 636, q. *35* to 37, 77 to 80. Root, p. 660, q. 47 to 50, 54, 132. Auchincloss, p. 68, xq. 46, *58 to 60*. Stacy, p. 116, xq. 40. Russell, p. 122, xq. 36 to 42. Muller, p. 182, xq. *29* to 64.

The numeral, wherever it appears, denotes size of thread.

Auchincloss, the virtual Appellant, testifies, p. 71, xQ. 69:

"To the world at large the words 200 yards are presumed to show the length. Nos. 40 and 50, the numbers on the label, are pre-

sumed to show the size of the thread; the words 'best six cord' or 'six cord cable' are presumed to show quality. In the case of J. & P. Coats, in which alone I have personal knowledge, the numbers embossed upon the spool heads were placed there for a specific object, namely, to preserve the numbers when the labels are defaced by the spindle of the sewing machine."

This is corroborated by Appellants' and Appellees' witnesses alike (*Smith*, p. 36, xQ. 31–35; *Le Pard*, p. 504, Q. 29–35; *Bartley*, p. 524, Q. 26–30; *Devin*, p. 541, Q. 56, 59–66; *G. P. Baldwin*, p. 549, Q. 27–34; *Fischer*, p. 636, Q. 26–30).

Hopkins, for Appellees, testified (p. 310):

"119 Q. What information are the numerals intended to convey and what information do they in fact convey to the trade and to the public, whether the numerals appear on the label or on the wooden periphery of the spool, and whether they appear upon one make of thread or another?

A. They describe to the person the size and number of the thread wound on that spool.

Six cord 200 yard thread generally, and Coats' and Merrick's in particular, is known by the name of the maker, and by no other name, is bought and sold by the name of the maker, and universally asked for and recognized by such name.

The testimony of *Appellants own* witnesses on this point is conclusive.

Says *H. A. Young* (C. R., p. 274):

"57 xQ. How many years did you say you have sold this Coats six cord thread at retail to those that use it?

A. Well ever since I have been in the business, for over 20 years—well, over 23 years.

58 xQ. By what designation has it been asked for all these years?

A. Coats thread.

59 xQ. Did you ever hear it called for by any other name or description?

A. No, we have had only Coats thread for a good many years, and this is generally known here, and so customers sometimes simply ask for thread or machine thread.

Says *Dallon* (p. 171):

"19 xQ. When customers inquire for the J. & P. Coats spool cotton that you have been talking about, what do they ask for, how do they designate it?

A. Well, some customers will ask for J. & P. Coats genuine, others again simply ask for Coats spool cotton.

20 xQ. That's the name by which it has been known throughout the trade and consumers, so far as you know, is it not?

A. That's right, as I stated in my previous answers.

21 xQ. By what other name or description, if any, has it been known so far as you can say?

A. I never knew it by any other name.

22 xQ. Are the other spool cottons also similarly known by their name, for example, I refer to Willimantic, Orrs & McNaught, Clark's O. N. T., Clark's Mile End, Brooks', Kerr's Merrick's?

A. They are known by their name, Willimantic, or either three or six cord, and Merrick's the same.

See also *Smith*, p. 36, xQ. 41–45, p. 39, xQ. 77; *Bowker*, p. 53, xQ. 33–38; *Auchincloss*, p. 93, xQ. 173–174; *Stacy*, p. 115 xQ. 26–27; *Sears*, p. 98, xQ. 38–40; *Dallon*, p. 171, xQ. 19–22: *Frost*, p. 176, xQ. 18–19; *Cox*, p. 200, xQ. 81–84; R. D. Q. 99, 100; *Koch*, p. 283, xQ. 36; *Young*, p. 274, xQ. 57–59.

Appellees' witnesses testified to same effect.

Hopkins testified (p. 322):

"183 Q. During the long period that thread of the best quality in 200 yard lengths, to your knowledge, has been put upon spools with the labels of black and gold in concentric rings, how have the different makes of thread been practically distinguished from each other?

A. They have been known and asked for by the name of the maker."

See also *Le Pard*, p. 503, Q. 16, p. 508, Q. 76, 77; *A. G. Baldwin*, p. 512, Q. 23, 25; *Bartley*, p. 529, Q. 79, p. 535 xQ. 139; *Devin*, p. 540, Q. 45, 47, p. 541, Q. 69, p. 544, xQ. 102, p. 544, xQ. 112, 113; *G. P. Baldwin*, p. 420, Q. 35; *Pierce*, p. 560, Q. 41–45, p. 573, xQ. 202; *Downs*, p. 587, Q. 14, 15; *Wiseman*, p. 592, Q. 21; *Cummins*, p. 619, Q. 23–26; *Le Boutillier*, p. 627, Q. 33–35; *Fischer*, p. 635, Q. 22–25; *Mrs. Jacklin*, p. 670, Q. 15; *Hart*, p. 683, Q. 24; *Mrs. Hart*, p. 702, Q. 19; *Hopkins*, p. 718, Q. 20.

It is also to be noted as an unconscious corroboration that throughout the evidence all the witnesses, and counsel universally, on both sides, designate the several makes of cotton thread by the name of the maker, and never otherwise.

The embossing as employed by the appellants in combination with their 200 yard six cord label, does not in fact, even by association, indicate origin, manufacture or ownership.

Says *G. Le Boutillier*, of 48 East 14th street, New York, a large retail dealer (p. 627):

"38 Q. Speaking for the customer, what influence does the fact have that Coats' and Merrick's spools bear the wooden numbers on the ends, toward causing either brand to be mistaken for the other?

A. No influence.

39 Q. Why not?

A. Because the cottons are known by their names, not by the number which designates the size.

40 Q. What has the appearance of the numbers on the wood, as they appear in those threads, to do with determining the brand of the thread, if anything?

A. Nothing.

41 Q. What is the purpose and utility of those wooden numbers?

A. To designate the size of the thread."

Says *Paton*, of Shelby, Michigan (p. 708, xQ. 39):

"I never saw a customer yet speak about those raised numbers; they always look at the name printed on the label."

Says *Hopkins* (p. 331):

"245 Q. State whether or not in your experience, you have found that Coats' thread is recognized by its having the number, etc., embossed on the periphery of the spool around the black and gold label; if not, how do you find that it is recognized?

A. I have always found it to be known by the name; and I have never heard anyone speak of the embossed numeral around the ticket unless their attention was called especially to it."

Says *Wiseman*, of Keokuk, Iowa (p. 592):

"26 Q. Did you ever know of Coats' 200 yd. six cord thread being distinguished or asked for by the stamped number in the wood?

A. No, sir, never; always by its name."

Says *Whitmore*, of Holyoke, Mass. (p. 578):

"26 Q. Did you ever know or hear of the numbers upon the wood of the spool being used for any other purpose than for the purposes you have stated?

A. I never did.

27 Q. Did you ever know this Coats thread to be enquired for or recognized in any sense by means of the number in the wood?

A. I never have.

28 Q. How, according to your experience and in your business, have the spools of this Coats thread been recognized?

A. By the label and the shape of the spool.

29 Q. How recognized by the label?

A. By the name.

30 Q. Have you ever known or heard of the spools of this Coats spool thread to be recognized in any other way than by the name upon the label?

A. I have not."

Says *Pierce*, of Boston (p. 560):

"43 Q. Did you ever hear or know of Coats' thread being asked for or distinguished from other threads by any means except the name?

A. No.

44 Q. Did you ever hear or know of its being claimed or advertised, or in any way made known, that the stamping in the wood of the Coats spools formed a trade mark, or any part of a trade mark, or any means by which the Coats thread was known from other threads?

A. No; you mean the stamping in the ends of the wood?

45 Q. Yes; that is what I mean.

A. No, sir.

46 Q. What is the use of the number in the wood?

A. To designate the number of the cotton—the size.

47 Q. Why does it appear there several times?

A. For the convenience of seeing at a quick glance the size of the thread."

Says *G. P. Baldwin*, of Newark, N. J. (p. 549):

"34 Q. Do you know of any other advantage or use that the wooden numbering has or is put to except to aid the customer in readily determining the size of the thread under all circumstances?

A. I can't think of any.

35 Q. How do people distinguish threads from each other?

A. By the name on the label."

Says *Le Pard*, of New York City (p. 505):

"46 Q. Did you ever know of Coats' six cord thread being designated or asked for by the stamped number in the wood?

A. No."

See also *Cummins*, of Washington, N. J. (p. 620, Q. 27), and *A. G. Baldwin*, of Newark, N. J. (p. 518, xQ. 95, 106).

On this question of fact, on which the entire claim of appellants to a trade mark in the combination of a numeral embossment with a label of concentric rings having the same numeral, rests, and on which their evidence should have been

definite and specific and overwhelming, the entire proof on appellants' side stands as follows:

Auchincloss, the virtual appellant, testified (p. 63):

"16 Q. State whether the six cord thread of the complainants, wound in lengths of 200 yards, has become known and recognized by the trade in the United States by any peculiar marks, designs, labels, and character of spool?

A. The six cord threads have been known and recognized by the trade in the United States by labels, designs, etc., as shown in Schedule C.; the tickets have been in use for forty-two years; the complainants have enjoyed the use of the trade marks embossed on the spools since their introduction, subsequent to 1870, except so far as interfered with by the defendant.

17 Q. State whether prior to the adoption by the complainants of any such marks, labels, designs and character of spools, any marks designs, labels and spools had been used by any other parties which were so nearly similar as to be likely to be mistaken for them?

A. None had been used.

18 Q. State whether the use of the black and gold label of the complainants' in connection with the embossed numerals on the edge of the natural wood of the spool, gives to the complainants' spools any distinctive appearance *or design* by which complainants' spools *can* be readily recognized from those of other manufacturers?

A. It does."

Sears, of Fitchburg, Mass., testified not on direct but on cross-examination, p. 99:

"51xQ. Do you observe the number of the thread on the wood of both the Coats and the Merrick spool, if so, please state what you understand is the object of that?

A. I noticed the numbers, and have always supposed it to be a sort of trade mark on the Coats' spool, not knowing any other spool cotton to be numbered in that way previous to the introduction of Merrick's or any other since.

52xQ. Did you ever hear any one say that that was a trade mark of Coats'?

A. No, sir.

53xQ. Nor ever heard it hinted at by anybody, did you?

A. No, sir.

54xQ. You are quite sure, are you, that you have never heard counsel for complainant, or anybody connected with Coats' people, say, or hint, that this was regarded as a trade mark?

A. I never heard it said or hinted any farther than it was a distinguishing mark.

55xQ. Who have you heard say, or hint, that it was a distinguishing mark?

A. Mr. Hazelwood, traveling agent for the Coats people; I think it is 'W.' Hazelwood, but I am not positive about it.

56xQ. You know what good purpose is subserved by having the number of the thread upon the wood of the spool, in addition to its appearing upon the paper label, do you not?

A. Cotton well introduced, and of good quality, there being no other number like it, would be likely to be known by the number on the spool, as well as by the name.

57xQ. You don't know of any other reason for having the number in the wood, in addition to the number on the label, do you?

A. I don't know of any other reason than the one stated above."

Ives, of New York City, agent for Willimantic Linen Co., one of Appellants' confederates, testified, p. 108:

"17 Q. Please state whether said Coats' thread has become popularly and generally known by any distinctive marks or appearances, and if so, what?

A. The general appearance of the head or top of the spool being characterized by embossed figures on the periphery, together with black and gold label, would in my opinion make distinctive marks by which Coats' thread is known.

Stacy, of South Berwick, Maine, testified, p. 114:

"20 Q. Why do you think that it would be very difficult or impossible for ordinary retail customers to tell one of said threads from the other?

A. Customers who are acquainted with Coats' thread tell it by the embossed numbers on the head, and unless they read the labels they could very easily mistake one for the other.

Cox, of Chicago, Ill., testified, p. 201:

"91xQ. The Coats people think it is a very useful thing to have the number on the spools, do they not, so as to determine the size of thread when the lable is defaced or lost?

A. I never heard them say so; I've always understood it was their trade mark."

And on redirect:

"109 R.D.Q. Have any spools in the market the raised numbers embossed on the wood of the spool around the label excepts Coats' and Merrick's of which you know?

A. I have never seen any.

110 R.D.Q. Is that embossing of the numbers a feature which marks the Coats spool and distinguishes it from others in your experience?

A. It has in many instances.

111 R.D.Q. State whether it has been recognized in the trade as a feature of the Coats spools?

A. I have heard it spoken of many times, by the trade, in connection."

Of these five witnesses one was the virtual appellant himself, Mr. Auchincloss, who in his business meets only jobbers, and so

can have only hearsay knowledge of what consumers recognize as the marks denoting origin. Another of the three, Ives, is the Willimantic Linen Co.'s general agent, as Auchincloss is the Coats' general agent. The Willimantic Co. is one of the four combined companies that are back of this suit. Mr. Ives, like Mr. Auchincloss, does not meet retail customers in his business. The third witness, Stacy, a young man from South Berwick, Maine, gives a short and general statement without instances or specification. It does not appear that he is qualified to testify on the general subject. His whole deposition is partisan. And still on cross-examination he said, p. 116:

> "33xQ. What is the advantage of having the number in the wooden periphery of the spool in addition to its appearing on the paper label?
>
> **A. If the label be lost there is nothing to tell what number of thread it is, unless it is on the head of the spool."**

Another one of the five witnesses, Mr. Cox, is traveling salesman for John Clark, Jr., & Co. of the Clark Mile-End Cotton, another member of the combination companies.

These same witnesses admit that the numeral denotes size of thread wherever it occurs, and that its embossment is a permanent and useful way of recording that size; and also that Coats' 200 yard six cord thread is ordinarily bought and sold and asked for by the name "Coats."

We therefore submit, without further argument, that on this vital question of fact in the case, to wit, whether or not the alleged combination trade mark, as defined in the bill and as used by appellees, does denote to the retail customer the origin or manufacture of the thread, the proofs adduced by appellants fall entirely short of meeting the burden of proof that is upon them on that question; and we further submit that on the whole evidence in the case, and on the nature of the marks themselves, the Court must find as a conclusion of fact that the combination of a label of concentric rings having a numeral thereon, and an embossed peripheral border of the natural wood showing the same numeral, does not, **without the name,** *indicate to the users of the thread the origin or manufacture of the thread.*

With this conclusion of fact the whole case as a trade mark case falls, for it is the foundation of trade mark property, with-

out which no infringement can produce damage and without which there is no infringible property known to the law, that the device or mark or combination of devices and marks relied upon and used by the defendant should, when used on complainants' goods, denote and indicate to the users thereof the origin or manufacture of those goods.

Authorities need scarcely be cited to this proposition.

Says the Supreme Court in *Delaware & Hudson Canal Co.* vs. *Clark* (13 Wall., 311):

> "The trademark must be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association."

The name "J. & P. Coats" on every spool of appellants' thread and the name "Merrick Thread Co." on every spool of appellees' thread proclaim adequately the origin of that thread.

The alleged trade mark, exclusive of the name, indicates merely the size, quality and length of the thread, by means of the old and well known label and by means of the expired patent design, and so it is not a lawful trade mark, and its use by another is not an invasion of appellants' good will in the market, or a sailing under their colors as to origin of goods, to the damage of appellants' legitimate trade.

THIRDLY.—INFRINGEMENT.

Appellees have not in any unlawful or unaccustomed manner assimilated the appearance of their articles to Appellants.

Appellees have not, as alleged in the bill, been guilty of any unlawful or unfair competition in business.

Appellees have not been sailing under any false colors as to the origin of their goods.

It was said by appellants in the Circuit Court; admitting (as the evidence compelled them to) that we have no lawful trade mark right either in the appearance of the spool head as a whole, or in any feature of it, yet we think that appellees have intentionally and without adequate reason other

than for unlawful imitation so assimilated the appearance of their 200 yd. six cord spool head (that is *one* of the spool heads) to ours, as that the public deceived by the unlawful likeness buys their thread for ours, and a court of equity has power to enjoin such an act as an unfair competition in business.

Undoubtedly such a simulation is, under a line of recent cases justly to be enjoined, but the case at bar is not such a case in a single feature, for there has been by appellees no intention to assimilate either expressed or inferable, no deception either accomplished or attempted; no assimilation or infringement,in fact for every feature adopted by appellees was rightfully adopted for adequate cause.

The law as to such unfair competition is clearly and judiciously stated in the case of *Avery & Sons* vs. *Meikle & Co.*, 27 O. G., 1027, and this was the case relied upon below by appellants as the keystone of their contention. But in comparing that case with the case at bar appellants touched only upon certain similarities or merely apparent similarities common to the two cases and unfairly suppressed the conspicuous dissimilarities as well as the six findings of fact relied on for granting the Avery injunction, not one of which or anything in place of them is found in the case at bar.

1. In cases of unfair trading, not sounding in a lawful trade mark it is essential, said the Court

> "to show a fraudulent intent, otherwise there could be no safety in the use of those things which are common to all, &c."

The Avery people showed clearly the frandulent intent of defendant.

The attempt by the Coats people to show a fraudulent intent by appellees was a conspicuous failure.

2. Again the Court said:

> "This limitation must be observed that if the means used are such as are common to all or not exclusively appropriated by another and injury follows, which is not the result of design and improper use of these means, no remedy exists."

The Coats patented design became common to all in 1878. Appellees used of it only the useful embossed number for the advantages enumerated in the patent, and combined that with their own star trade mark. The black and gold label of concentric rings with name, number, quality, and length upon

it was common to all for years and years. In the respects in which Coats differed from this universal label, appellees differed from Coats and followed the old custom. The similarities common to Merrick and Coats are common to all the trade.

3. Again the Court said as expressed in the head lines.

> "If the differences are only colorable and there is no reason for the resemblances except the purpose of deceiving the purchasers, etc., the Court will presume a fraud was intended."

In the Avery case the differences were merely colorable and the imitation was of no advantage except to sell the defendants' ploughs for complainants.

In view of the state of the art the differences between the Merrick and Coats product, including the black and gold label and embossment, are not colorable but radical. Every feature used by Merrick has an adequate and proper purpose for its use. There was present no purpose to deceive by appellees, and no deception.

4. No part of the appearance of the Avery plow was the subject of an expired patent design.

On the other hand no simulation of Coats by Merrick was complained of till this expired patented numerical embossment was used by Merrick. For 16 years no complaint was made concerning the label, either against Merrick or the various other thread makers who used it. This fact alone completely distinguishes the Avery case from the case at bar.

5. The defendants in the Avery case dismantled the Avery plows,

> "and with great accuracy copied every important and ordinarily noticeable part of them" and determined without any claim of right, "come what may, to take the bull by the horns."

On the other hand, Merrick waited till the Coats patent expired, notified Coats they were going to use the embossment, made use only of its useful feature, put their own trade mark with it and lastly, when notified of infringement by Coats, promptly justified their use.

6. The Avery people used letters of quality PO, AO, BO, CO for steel plows and figures of quality ½, 1, 2, 3, 8 for cast plows. The defendants, who had before infringement not only used different letters and figures of quality but used the

letters on the cast, and figures on the steel plows, changed their letters and figures for the Avery letters and figures and put them on the same kind of plows as Avery.

On the other hand the Merrick Co. never made any change whatever from its own practice to or toward Coats except when the patent expired to use the patented numerical embossment with their own star in their only proper place.

7. The defendants in the Avery case left off their own trade-mark and name from large quantities of their plows.

On the other hand Merrick Thread Co. and its trade mark of the star are the two most conspicuous marks on every single spool of their thread, on packages, circulars, cabinets, etc., etc. The Merrick Co. spends vast sums of money in advertisement, the very purpose of which is to unmistakably identify the thread as Merrick, and so increase the sale of it.

8. If in the Avery case p'aintiff's name and cross trade mark and defendant's name and diamond trade mark were left off the plows the articles could not be told apart in any way.

With a like elimination the Merrick marks differ radically from the Coats and in numerous particulars.

There are only three other marks on the Coats *black and gold* label, viz.: the quality, length and size mark. In Merrick the length mark is not used at all. The quality and size mark are in different and in better and in the universally used places and in different type. An essential feature of the Coats, registered trade mark was placing the "numeral in the central spot." The Merrick numeral is not only at the side, the universal place for it, but on a plain well defined shield. Merrick omits the embossed threads and lines of the Coats embossment.

The Merrick label on the other head of the spool is totally different from the Coats, here again following the trade practice, and this Merrick label conspicuously denotes origin by the use of their own ancient and never disused names of the thread "American" and "Standard." The Merrick spool itself is differently shaped and sized from the Coats, here departing from the Coats and from all previous practice.

9. In the Avery case the defendants

> "employed small salesmen to sell their plows who placed them on the market one-half dollar cheaper than the Avery plow and so advertise them as to be taken for those of Avery."

The consumer pays for Merrick thread the same as for Coats always.

The Merrick Co. do just two things as Coats does them : (1) they use the embossed numeral as authorized by the expired patent. (2) They put their own name in the outer circle of a black and gold label, the universal custom for years and years.

This Avery case has been thus minutely considered because appellants below made much of it but left out the main facts from their parallel. In cases of unfair trading all the facts must be considered, and when that course is observed, not only the Avery case, but every case of unfair trading, in the books will be found to support the appellees' contentions in this case.

In *Croft* vs. *Day*, 7 Beav. 84, and in *Holloway* vs. *Holloway*, 13 Beav. 209, the defendant imitated exactly, and in the latter case copied exactly the labels of plaintiff and this, although the name of defendant was the same as plaintiff and also used. Deceit was " clearly " proved. McLean *vs.* Fleming 96 U. S. 245 was a like case.

In the case at bar appellees name is totally different; no feature of the label is copied from appellants. Merely the numeral of the expired patent is used. Every feature of appellees' article is either distinctively their own, or else distinctively public and hence also their own. This case comes well within the principles laid down in *Brown Chemical Co.* vs. *Meyer*, 139 U. S., 540, for

(1) No rights in any lawful trade mark exist.

(2) The name, labels and other dress are widely unlike and would never mislead.

(3) The boxes, packages and advertising media are all distinctive instead of similar.

(4) Every alleged similarity is in view of the state of the art unavoidable, and publici juris.

(5) All indicia of unfair trading are wanting.

(6) The evidence shows the two threads are universally purchased as distinct and separate,—not mistaken for each other.

(7) Suit was not begun till 1883, 4 years after appellees had asserted to appellants their entire right to the dress complained of in 1879.

(8) By 1883 appellees by superior energy and a better domestic article were gaining the popular favor.

Moxie Nerve Food Company vs. *Defendants*, 43 O. G., 888,

cited by appellants below has no application here. Judge Colt being

> "satisfied that the defendants used the words 'Nerve Food' as a means of effecting a fraud upon the public"

declined to modify an injunction order. A use of the words "Nerve Food" was a use of the very name of the plaintiffs' goods, like the use of "Stone Ale" in *Thompson* vs. *Montgomery*, L. R., 41, Ch. Div., 35, and the use of "Glenfield" in Wotherspoon *vs.* Currie, L. R., 5 H. L., 508, and many other cases where there was no adequate cause for the use of the name of plaintiffs' article except to trade thereby unfairly. Kindred cases are *Jennings* vs. *Johnson*, 37 F. R., 364, Evans *vs.* Van Laer, 32 F. R., p. 153; *Frost* vs. *Rindskopf*, 42 F. R., 408, where defendants used "Warranted Hose Supporter" instead of Warren Hose Supporter and could give no sufficient reason for using Warranted instead of Warren. See also *Leggett Co.* vs. *Finzer*, 128 U. S., 182.

In the present case, threads are not only universally known by the name of the manufacturer but appellants' and appellees' names are totally distinct and unmistakably found on the spool, box, packages, cards, etc., etc. The disclosure of appellees' name in full on its spools, on both ends of them in substance, to say nothing of other distinctive names and marks, entirely overbears, as was said in *Amoskeag* vs. *Trainer*, 101 U. S., 51, every thing else as indicative of origin.

The language of this court in *Lawrence Co.* vs. *Tennessee Co.*, 138 U. S., 537, is almost precisely applicable here.

> "But the deceitful representation or perfidious dealing must be made out or be clearly inferable from the circumstances. If, in this case, the letters LL formed an important part of plaintiff's label, and the defendant had used them in such a way and under such circumstances as to amount to a false representation, which enabled it to sell and it did sell its goods as those of the plaintiff, and this without the plaintiff's consent or acquiescence, then plaintiff might obtain relief within the principles of the cases just cited. But there is no such state of facts here. The brands are entirely dissimilar in appearance, and the letters have for years been understood generally as signifying grade or quality, and been so used by different manufacturers, and there is no proof justifying the inference of fraudulent intent, or of deception practiced on the plaintiff or on the public.
>
> "The decree is therefore affirmed."

Even if the circular black and gold label of concentric rings had not been publici juris for many years as merely indicating 200 yard 6 cord thread, still the use of the same colored label, capsule, wrapper, etc., is not unfair where other labels or names, etc., proclaim, as here, the origin of the goods. See *Mumm* vs. *Kirk*, 40 F. R., 589; *Philadelphia Co.* vs. *Blakesley Co.*, 40 F. R., 588; *Same* vs. *Rouss*, 40 F. R., 585, especially page 586–7, where after referring to the general similarity of such small articles as crimpers, or as might have been said spools of thread, the Court said what is perfectly applicable here, that a purchaser really preferring the complainants' article would not be deceived unless partially blind, (for example, like appellants' agent and witness Beale), or of an unusually heedless disposition (for example, like appellants' superintendent, Belfield), or as might have been added, unless desirous of being deceived like most of the rest of appellants' witnesses.

In *Evans* vs. *Van Laer*, 32 F. R., 153, the defendants were justified in using the same words and name for their article as complainants and a label similar in color and the same kind of bottles. The Court said:

> "Stress is laid upon the fact that the bottles are alike, but bearing in mind that the evidence discloses that most lime-juice bottles are quite similar in size and design, I do not deem this very important."

Defendants' bottles were enjoined only where they had (in addition to above resemblances) complainants' name blown in them.

In Shaw *vs.* Mack, 12 F. R., 707, a case cited below by appellants, Mack had been Shaw's agent, and his infringement was an aggravated and barefaced imitation, including the use of a lawful trade mark. This was also substantially the situation in Boardman *vs.* Brittania Co., 35 Conn., 402, a case also cited by appellants.

In Sociélé Anonyme, etc., *vs.* Cook, another case cited by appellants below (see Daily Register, March 20, 1888), defendant's fraudulent intent was unmistakably proved, "not contradicted, even," said the Court. Every essential feature was imitated. There were false and fraudulent statements of origin and of ingredients pointing to plaintiff's article. The very name itself of the article was fraudulent and imitative of plaintiff's name. Defendants used the design of plaintiff's expressed

patent, and were justified in *that*. For their unjustifiable acts and purposes they were condemed.

The question "what constitutes infringement of a trade mark?" is as well answered in *McLean* v. *Fleming*, 96 U. S., 245, as anywhere.

In that case the Supreme Court said (p. 251):

> "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition, as applicable to all cases. All that courts of equity can do, in that regard, is to say that no trader can adopt a trade mark, so resembling that of another trader, as that ordinary purchasers, buying with ordinary caution, are likely to be misled * * * but a court of equity will not interfere, when ordinary attention by the purchaser of the article, would enable him at once to discriminate the one from the other."

And again (p. 254):

> "Nor is it necessary in order to give a right to an injunction, that a specific trade mark should be infringed; but it is sufficient that the Court is satisfied that there was an *intent* on the part of the respondent to palm off his goods as the goods of the complainant."

Under either test the proof is clear in this case that the defendant has not infringed; for no *intent* has been proved to palm off its thread as the thread of complainants, and it has not been proved that its spools so resemble complainants' as that ordinary purchasers, buying with ordinary caution, are likely to be misled. On the other hand, the contrary of these two propositions has been clearly proved herein.

An instructive case on infringement is *Leather Cloth Co.* v., *American Leather Cloth Co.*, 11 House of Lords Cases, 523, where Lord *Cranworth* applies to such a question the maxim "*vigilantibus non dormientibus leges subserviunt.*"

When the question is one of general resemblance of dress of goods, wrappers, etc., the test of infringement is the same.

Talcott v. *Moore*, 5 Hun, 106.

Where there is a purpose to defraud, the acts of imitation are usually manifest. Appellant's assimilation of its own No. 110 thread, which is 3-cord thread to No. 100, which is 6-cord, in order to get a 6-cord price for a 3-cord thread, is a good example of such assimulation. Yet appellants say through Mr. Auchincloss that this resemblance is not such as to mislead, because the words "best sewing cotton" are used on the 3-cord, instead of "best 6-cord." Page 81 and pages 115, 116.

When the suit is not upon a specific or proper trade mark, it can be maintained only upon the ground of actual fraud on part of defendant.

Anheuser-Busch Brewing Ass'n v. *Pisa*, 24 Fed. Rep., 149.
Lea v. *Wolff*, 1 Supreme Ct. (T. & C.), 626.
Leclanche Battery Co. v. *Western Electric Co.*, 23 Fed. Rep., 276.
De Kuyper v. *Witteman*, 23 Fed. Rep., 871.
Carbolic Soap Co. v. *Thompson*, 25 Fed. Rep. 625.
Fleischmann v. *Schuckmann*, 62 How. Pr., 92.
Kinney v. *Basch*, 16 Am. L. Reg. (N. S.), 597.
Morgan's Sons & Co. v. *Schwachofer*, 5 Abb. New Cases, 265.
Schumacher v. *Schwenke*, 36 Off. Gaz., 457.

In the case at bar no such fraud or fraudulent practice by the appellees is shown, and none exists, as has been affirmatively proved, and moreover there is no misleading resemblance.

We will now consider in detail and with references to the testimony along the lines above briefly outlined whether a case of unfair trading or infringement by the appellees has been made out.

The appellees' propositions are intended to be so comprehensive as to form a denial of any sort of interference whatsoever with any exclusive right of the appellants in the assemblage of marks sued upon, whether they do or do not constitute a lawful trade mark.

The subject will be considered under four aspects, as follows:

A. There has been no design to infringe, imitate or unfairly compete.

B. There is, in fact, no unlawful or unaccustomed or unfair resemblance.

C. There are not any disinterested reliable opinions that there is any deceitful or deceiving resemblance.

D. Not a single instance or item of damage or injury of any kind to appellants resulting from appellees' use of such marks nor any probability thereof has been shown.

A.

There has been no design to infringe, imitate or unfairly compete.

1. Such a design and purpose are expressly denied.

2. No such design is inferrable from any act of appellees, but every feature of marking had an adequate lawful purpose.

3. The conduct of appellees is inconsistent with the entertainment of any such purpose or design.

1. The design or purpose to infringe or imitate, or unfairly compete, is expressly denied.

Appellees' answer contains, first, a detailed and distinct denial of any such purpose or design, expressed in most inclusive language, and it also contains an allegation that they have *taken pains* to mark the thread so that there should be no mistake, and so that their marks should be plainly distinguishable, not only from appellants, but from all other manufacturers. (Answer, p. 1, fols. 46, 47, see p. 296, Q. 3 to 16, 44, 45, 69 to 75, 88, 90, **100** to **133, 136** to **141, 144** to **151** (especially fol. 232 *et seq.*), **153** to **171,** xQ. 909, R. D. 976 to 985, 989 to 992, **1013** to **1020, 1069** to **1074**).

2. No such design is inferrable from any act of the Appellees.

(*a.*) *Mr. Auchincloss, virtual complainant in the case, at p. 65, Q. 28 to 37, xQ. 62, 126 to 133, 135, is questioned on this subject. In answer to Q. 28, he gives six reasons why he thinks the Merrick Thread Co. labels and designs were adopted for the purpose of deceiving.*

First.—That formerly they used a different design.

Second.—That in 1878 they wrote Conant inquiring where they could get dies like J. & P. Coats.

Third.—That when they with others were charged with infringement by Varnum & Harrison, Appellants' attorneys, in August, 1879, they continued while others ceased.

Fourth.—" That Mr. Merrick was, many years ago, engaged with other parties, copying J. & P. Coats' trade marks, from which they were restrained by injunction."

Fifth.—That the Merrick Thread Co.'s *three* cord thread has no gnarling or embossment and bears an entirely different ticket from the *six* cord.

Sixth.—That, whereas their long length *six* cord thread or some of it formerly bore a label, without the embossed design, latterly it bears no label, but has, like Coats', only the name, Merrick Thread Co., and the embossment both in the wood.

Mr. Auchincloss' *first* and *fifth* reasons for inferring purpose are, that formerly The Merrick Co. used a different design, and it appears by his answer to xQ. 62, p. 70, that the former different design referred to, in both the first and fifth reasons, was the Merrick label for their three cord thread. Now three cord thread costs about half as much to make as six cord; is far inferior, though it may be made of same material, and brings about half the price of six cord. By honest dealers it is made to look as different as possible from six cord; the spool is longer and narrower, the circular black and gold label of concentric rings identified for half a century with 200 yard six cord thread is not used, and an honest dealer will put upon that three cord thread no mark which the six cord line should bear (see Appellees' answer p. 16). Appellants are charged in this case with getting a six cord price for a three cord thread, and thus for years defrauding the public, by dressing some of their three cord thread, in the six cord black and gold label; and, forsooth, the Merrick Co. are criticised for making the distinction between those two utterly different lines of manufacture so wide. The Merrick Co. made three cord long before it made six cord, and marked its three cord as three cord, in the old accustomed manner; when in 1868 it began to make its 200 yard six cord, of course it marked it differently, and, of course, it marked it also in the fifty year old, time honored manner with the black and gold label of concentric rings with the usual descriptive matter in the usual places. And so it continued to do undisturbed for ten years. And when in 1878 or 9 the Conant design patent (owned by appellants and used by them through the latter part of its term) with its ornamental character and its many utilities had expired, it wrote the Coats people in substance that it proposed to emboss its spools and then it proceeded to do so, not, moreover, as it had a perfect and un-

doubted right to do, exactly following the Coats design, but varying from that design in directions both to distinguish it from Coats' and to indicate Merrick as the source.

The *second* reason given by Auchincloss as indicating deceitful purpose is that the Merrick Co. wrote Conant asking where they could get the Coats dies for embossment. Now Mr. Conant was the recognized head and front of The Conant Thread Company at Pawtucket, which makes all the Coats thread sold in this country, and seven-eighths of the stock of which is owned by Appellants. This letter and the reply to it were put in evidence by Appellees (not Appellants) and they are printed at page 312. They were put in evidence by Appellees to prove and they do prove the entire *absence* of purpose to imitate, and they show both *that* and that Appellees' conduct was open and above board, as it always has been from 1865 to 1893. Of course, after receiving Mr. Conant's letter, the Appellees made their own gnarls, and embossed their spools with the numerals of the expired Design Patent in order to secure the utility and beauty of that design. It was not till after this expired patent design is used in part by Appellees that Appellants make any complaint, and even then they waited four years before beginning suit. Merrick thread had become a rival by reason of its merits and the energy of the Appellees.

Mr. Auchincloss' *third* reason for inferring purpose was that "when their attention, and that of other parties copying the same designs for trade mark, was drawn to the similarity of these designs to those of J. & P. Coats, the Merrick Co. alone continued their use."

The "other parties" referred to, as appears from the bill, were a certain Green & Daniels, Semple & Ellis. Of them Mr. Hopkins says (p. 333, 257):

> "Ellis I never heard of in making thread; Green & Daniels made a three cord thread for quite a long time; I never saw any of their six cord thread in my life, and they have now stopped putting up spool cotton altogether, as I understand; Semple made but very little six cord, and has now gone out of business."

It nowhere appears what they used or what they stopped using, but, whatever it was, their stopping has no significance whatsoever.

1. Because they never got started.

2. Appellants' charge was of an infringement of the Conant patent owned by them, and by the same act of the registered trade mark for, in effect, the same subject matter (see p. 314). The patent had expired more than two years before this false notice was given, and these people very likely stopped, if there was any stopping, supposing that Coats really had a patent as they said, or supposing that a registered trade mark in some way perpetuated the patented design.

3. Any concern so weak as these people, would stop breathing, if ordered to by J. & P. Coats, who could overwhelm a disobedient manufacturer in the market, if not in the courts.

4. Yet it nowhere appears that either of them stopped because of the notice, and neither of them is called as a witness.

Mr. Auchincloss' *fourth* reason for inferring a purpose to imitate, is that Mr. Merrick was, many years ago, engaged with other parties, copying J. & P. Coats' trade marks, from which they were restrained by injunction. This charge is utterly untrue.

The Mr. Merrick referred to, who is Treasurer of the Merrick Thread Co., and who was one of the Merrick Brothers, the name of the Appellees' concern for some years prior to 1865, was never in any way "engaged with other parties" or at all in any such business, and Mr. Auchincloss is challenged at p. 84, xQ. 126, to state any fact or circumstances warranting that false charge and he says he knows of none. Upon Mr. Hopkins' cross-examination (see p. 331, xQ. 299 to 325, and R D. 1045, 1046), it appears that the suit referred to was Coats *v.* The Willington Thread Co.; that neither Mr. Merrick, Merrick Bros., nor the The Merrick Thread Co. ever had anything to do with the Willington Co., except that Mr. Merrick as a laborer in former years turned spools for that company. The gist of the suit referred to was that the Willington Co. were charged with fraudulently putting the name of *Coats* on their thread and **with fraudulently selling it as six cord when it was only three** (see p. 731, where Coats' bill of complaint in that case is printed, especially pp. 732, 733). **This latter fraud is just what Appellants themselves have for a good many years been guilty of and are charged with, in Appellees' answer.** It is discussed at pages 107 to 133 of this brief.

The *last* and weakest reason put forward by Auchincloss for inferring deceitful purpose is (see p. 66, Q. 35, 36), whereas Appellees' long length six cord thread, or some of it, (he means 500 yd.,) formerly bore a label only, that latterly it bears no label, but is embossed with their name and the number both in the wood, and that Coats' is thus embossed and never bore a label. This is a closer adhesion to the universal practice of reserving the black and gold label for the 200 yard six cord thread.

The facts are that the Merrick Co., in 1868, began to make *200 yard six cord*, and at the same time, or a little later, began to put up six cord on two ounce spools. It put a black and gold label temporarily on this two ounce six cord and perpetually on the 200 yard six cord so that the public might know that it was six cord, for a black and gold label had been used on *200 yard six cord* for a generation at least, and had always been a badge of six cord thread when put on 200 yard spools. The 500 yard six cord thread of the Merrick Co. has their name and the number in the wood. Says Auchincloss: "The similarity consists, in the thread subsequently sold, in the numbers embossed upon the spools."

Now this feature, as already said, is the subject of the Coats expired patent; was not used by Appellees till the patent expired, was then used for the utilities and beauty of it, was the subject of the letters by Appellants' attorneys herein on Aug. 12 and Sept. 19, 1879, was made the subject of a charge of infringement of a separate and distinct trade mark in the original bill herein, and the charge was struck out on demurrer and was never renewed and defendants are ready to meet it if it ever be renewed.

The black and gold labels used on 200 yard and two ounce spools in 1888 respectively are shown as A and B on "Defendants' Exhibit No. 27, Card of Defendants' Black and Gold Labels." The use of these labels was continued for ten years, till 1878, when Mr. Johnson, the President of Merrick Thread Co., having died, the concern decided that "Merrick" should now be the name of all their 6 cord thread, and in making that change some minor features of the label of the two ounce six cord spools were thenceforward followed in both this long and the 200 yard lengths as a plainer and more descriptive way of marking the thread, as shown at C of Defendants' Exhibit 27,

above referred to. (See Hopkins, D. R., p. 306, q. 90 to 116.) The long length referred to by Auchincloss in his criticism was not this two ounce six cord, but was spools of 500 yards, and *it is not true that this thread ever bore a label. It never did.* In 1878, Merrick Thread Co. *began* to make 500 yard six cord, and the Conant patent having expired marked it as they do to-day, and as appears in Complainants' Exhibit.

The other long lengths two ounce, 1,200 and 2,400 yards were also never changed, but have borne the black and gold label from the beginning till now. What troubled Mr. Auchincloss was that in 1878–9 Appellees put upon their new make—500 yards—the numerical embossment of the Conant expired patent, and that and nothing else forms the subject matter of Coat's attorney's letters of Aug. 12 and Sept. 13, 1879.

So much for the flimsy reasons for inferring a deceitful purpose.

(*b.*) *Appellees have an adequate and sufficient reason for the use of every single feature of their marks and labels.*

Beginning with the cross-examination of appellants' witnesses and continuing to the end of the testimony, it is proved, and it has not and cannot be disputed, that the following features of resemblance are common to all the principal six cord 200 yard spool threads and have been so for at least half a century in this country. Experiment and experience have shown these features to be the most suitable, most ornamental and most expressive way of marketing the goods, and that is why appellees use them. They are just as much a matter of growth as the prevailing similarities of spoons, forks or pencils, and just as fully matter of public property. They are as follows:

1. A spool of a certain material, color, length, diameter, shape.

2. A label, mainly black or mainly gold, with the balance either gold or black, and arranged in circles, the label circular in shape, with descriptive matter in circular lines consisting of and arranged as follows: the name and the number in the outside circle, the quality in the next circle, the length at the center.

3. A second label on one end of the spool, mainly white and blue or white and black, which label is of paper, circular in shape

with descriptive matter in black letters, some of it in circular and some in straight lines, being the name of maker or agent, the thread number, length and quality, and sometimes a trade mark or symbol of some sort.

4. An ornamental embossment of varying design in the periphery of the wood around the label.

From these time-honored characteristics Coats deviated in two essential particulars. Coats put the number (as well as the length) at the center of the label instead of in the outside circle, and this is specified as an essential feature of their trade mark sued on. They also put the quality in the outside circle instead of in the inner circle.

The Merrick Thread Co. has adhered to the time-honored practice in *all* particulars except one, in which also it differs from Coats', to wit, the words 200 yards are omitted from the black and gold label altogether, and by way of added distinction from all makes, Coats' included, has put its ancient star, used now for a quarter of a century, where other makers often put their peculiar mark, to wit, in the center of the label, where Coats distinctively puts the number and length of the thread.

In one particular only does Merrick resemble Coats in the location of all this descriptive matter, and in that it only partially resembles Coats and fully resembles the other makers, and that is in the location of its name in the outside circle, its proper, most prominent and ancient place. In all other particulars of location of all this descriptive matter, the Merrick follows the usage of the majority (Coats' practice being in a minority of one) or deviates from all, Coats' included. It only partially resembles Coats' in the location of its name, for the words "Merrick Thread Co." fill the circle, leaving room only for the number, and some part of the name is plain and bespeaks the rest in any position of the spool, while "J. & P. Coats" occupies less than half the circle, and is illegible about half the time unless the spool be turned. If there really were any likelihood of the deception alleged by Coats, of which there is not a particle, this difference would be important, for the testimony from the first to the last witness in the case is overwhelming and uncontradicted that it is by the name, and the name only and not by any embossment that this line of thread is bought,

sold, known, recognized, asked for, from the manufacturer down to the sewing woman and the child—the name, and the name only and always.

The name "*Merrick Thread Co.*" was used to denote the source of the thread and becomes as in all other threads the name it bears from the factory to the work basket.

"*Best Six Cord*" was used to describe the quality as a thread made of six cords or strands of yarn and as the best thread, being universal words of quality description.

The *Numerals* whenever and wherever appearing are used to describe the size of the thread, as they have been immemorially.

The *Star* has been used as a trade mark continuously since 1867.

And so it is by right of long prescription and for adequate reasons that the Merrick Thread Co. adopted and has used each one of the features above enumerated, whether of materia shape, size, color, name or mark together with their location and arrange ment.

Now what is there left that the Merrick Co. has used which Coats uses? Just one thing, the embossed numerals appearing several times on the wooden periphery of the spool, and this lawsuit is in essence brought for no other purpose than to stop that use and keep it for appellants, with all its utilities and beauties. There was no complaint till that was used. When complaint *was* announced, it was of that alone. See letters of August 12 and Sept. 19, 1879, above referred to. But the use of these numerals, several times embossed in the wooden periphery of the spool unoccupied by the label, with some ornamental tracery (omitted in use by the appellees but employed by appellants), was the subject of the Conant patent, which appellants enjoyed exclusively to the end of its term, and the use of the numeral in that way and place was the *only novelty* of that patent, the ornamental tracery being admittedly old. It is true no other concern uses this numerical embossment except appellants and appellees, but any concern can do so rightfully, and one witness says it would be a good thing if they should. This numerical embossment feature, is the feature which is found on the Merrick spools and on Coats, and not on the spools of other makers.

Throughout the entire testimony, of appellants and appel-

lees alike, there has been no disagreement as to the great and numerous utilities of this numerical embossment used just as Merrick Thread Co. uses it.

Except in this matter of numerical embossment the Merrick article resembles the others more than it does Coats.

Disregarding numerical embossment the black and gold end alone of Merrick spool differs from the Coats.

1. In the location of the label numeral.
2. In the size of the label numeral.
3. In the location of the quality description.
4. In the size of the quality description.
5. In the color of the quality description.
6. In placing their ancient symbol a star at the center of the label.
7. In the use of a shield for the numeral.
8. In the prominence and plainness imparted to the name by its length.
9. In being mainly gold, instead of mainly black.

In most of these 9 features Merrick has followed the universal practice.

Disregarding in like manner the numerical embossment feature, the Merrick differs not only from the Coats, but from all others, in the following particulars:

1. In the use of the star at the center instead of the number and length or any other symbol.
2. In the use of the wooden stars on the periphery of all instead of on a part only of the 200 yard 6 cord thread.
3. In various features of the black and white label, on the other end of the spool.
4. In the omission of the length from the black and gold label and placing it on the other label.
5. In the marked difference in length of the spool in the numbers most used.

In the matter of the peripheral wood embossment Merrick differs from Coats—

1. In the use of the star on all its numbers.
2. In the omission of any merely ornamental embossment such as was old with Orrs & McNaught, J. & J. Clark and Coats themselves.

Here are sixteen features of difference between Merricks and Coats. If the details of the differences between the diverse labels on the other end of the spool are counted, this number would be greatly increased.

Merrick uses the *star* embossment for two reasons: 1. As indicating source. 2. To form a bearing point for the gnarl which slips and duplicates or defaces the numeral without this mechanical aid.

Merrick used the *numerical* embossment in the following features, all of which became public property by the expiration of the Conant design patent, and all of which were used for a purpose:

1. The number, to describe size of thread.
2. Embossed to be plain, beautiful and permanent.
3. Several times, and in varied positions, to be readily seen whichever side up the spool be held, and for beauty.
4. On the end with black and gold label, because that is the end most generally observed to see the name and number.
5. On the periphery outside the label because there is no other place; that is the best place and it is a great aid to put the label on centrally.
6. A necessarily slightly smaller label incident to the use of any embossing of legible size.

The testimony of Mr. Hopkins upon the subject just reviewed is found in many places in his testimony, but particularly at D. R., p. 325, Q. 213 to 222.

Not only, therefore, is no deceitful purpose inferable, but an adequate, sufficient, and a lawful reason exists for the use of every feature of appellees' marks and appearances.

3. Appellees' conduct commercially is inconsistent with intent to deceive, for its name, which is the name of the thread, has always accompanied the thread in a most conspicuous manner all the way from the factory to the needle, not only upon both ends of every spool, but upon hundreds of costly advertising cabinets, thousands of expensive show cards, and mil-

lions of wrappers, costing, up to 1887, upwards of two hundred and fifty thousand dollars, all for the purpose of identifying the name of the appellees with their thread. These articles all have "Merrick" purposely the most conspicuous thing upon them; "American" and "Standard" and their star, the next most conspicuous things, and are furnished *free* to retailers and consumers. Samples of them are

1. Defendants' Exhibit No. 35, Cabinet.
2. " " " 36, Show Card No. 1.
3. " " " 37, " " " 2.
4. " " " 39, " " " 3.
5. " " " 38, Advertising Card.
6. " " " 40, Ten Doz. Wrapper.
7. " " " 41, Counter Wrapper.
8. " " " 42, Color Card.
9. " " " 43, Box containing Spool.
10. " " " 44, One Doz. Box.
11. " " " 57, Star Show Card.

For the use made of these articles, the object and manner of introduction, cost, etc., see D. R., Hopkins, p. 318, Q. 159 to 171; p. 417, Q. 1064-5; LePard, p. 504, Q. 25 to 28.

In view of such conduct the efforts of Appellants to show a deceptive intention or purpose, are almost puerile.

B.

No infringement, no unlawful or unaccustomed or deceitful or deceiving resemblance or unfair use of any feature, has been proved.

1. The best evidence of such conduct would have been evidence of actual deception or mistake by reason of similarity in features *not lawfully used* by the Merrick Thread Co., but there is not a word of such evidence in the record.

2. The next best evidence would be of deception or mistake, *without distinguishing whether the deceit or mistake arose from lawfully or alleged unlawfully used features.*

It has been already shown that every feature of Appellees' thread is used both lawfully and for an adequate reason, so that even if cases of deception or mistake were proved, they would be cases of mere accident and by which Appellants are not damaged any more than every other manufacturer of thread, in-

cluding the Appellees, being the legitimate results of competition.

But no trustworthy instance of such deceit or mistake is proved. The Appellants have given evidence, taking their two *prima facie* cases together, of a number of instances of *alleged* deceit, but in every instance the deceit was a deceit of Appellants' emissary or witness and not participated in by the spool of thread.

3. The next best evidence would be that of opinions that mistake or deceit is likely in the ordinary course of trade, from a similarity in features not *lawfully* used by the defendants.

But there is no such opinion

4. Next would come *disinterested* opinions that deceit or mistake is likely, from resembling features, but without distinguishing whether the defendants lawfully or unlawfully use the resembling features, but:

C.

There is no disinterested, reliable opinion that there is a deceitful or deceiving resemblance.

There are interested opinions. Every Coats' agent, employee, jobber and salesman, and every agent of Coats' three confederates in the great spool cotton combination, and every confederate but one responds to counsel's leading with a glib "Yes, sir," or "I think so," and some of them are ready with a modern instance, so modern that they are more recent than the filing of the bill.

Appellants' witnesses are interested witnesses. The Appellants' J. & P. Coats, and the two Clark concerns, early associated themselves together as a combination to keep up the price of the 200-yd six cord thread. Until the Merrick Thread Company secured a footing, the Willimantic Linen Company was the only domestic enterprise that ever succeeded in making any substantial headway in this country against these foreign makers but the Willimantic Company itself was finally, as one of appellants' witnesses, a Clark agent, expresses it, "*brought in*" to the combination. (C. R. Cox, p. 192, xQ. 25 to 39, esp. 29.) These four great concerns, Coats, the two Clarks and Willimantic, are known throughout the country

as **The combination.** Some of the means taken by its members to keep up the price to the consumer, to punish the retailer who sells the thread at less than the price determined upon by the combination, and to keep the great jobbing concerns throughout the country in pecuniary interest with the combination, will be referred to. The Merrick Thread Company does not belong to this combination. It has adopted different business methods from those of the combination. Its thread is a better thread, and sells to the consumer at a little higher price, taking the country together, than the combination threads do. The Merrick Thread Company, in marketing its thread, omits the great jobbers and sells directly to the retailer, while the combination thread goes through the jobber's hands, and leaves a jobbing profit there, and thence to the retailer, and the retailer makes his profit. Three profits are taken before the sewing woman threads her needle with **combination** thread —the maker's profit, the jobber's profit and the retailer's profit. Not so with the Merrick thread, which is sold to the retailer at first hand and skips the jobber. This is where, in the matter of business methods, the Merrick company has an advantage over the combination companies, and incurs their hostility, because the Merrick company sells to the retailer at a little lower price than the retailer can buy combination thread of the jobber. Now it is easy to see how it is that the four combination companies and the omitted jobbers are all hostile to the Merrick Thread Co., and why a part of the business of these combination companies and of these jobbers, during the past four years, has been to furnish witnesses for appellants in this suit. **Out of the 38 depositions given by appellants, 28 were by their own agents, salesmen, jobbers, or else by members or agents of their three allied companies.**

Appellants were unable to procure a particle of evidence from a single consumer that deception or mistake was likely, much less that deception or mistake in the regular course of trade or use of the thread had occurred. With two or three possible exceptions, appellants offered no trustworthy evidence, even of retailers, that deception or mistake was likely or had in fact occurred.

Four witnesses were actually hired by appellants to manufacture the evidence they gave.

Appellants called 35 witnesses who gave 38 depositions. Not a single consumer was among them. Only five or six retailers were among them, and of that small number, two, and perhaps three, were shown to be untrustworthy. The remaining 29 in number were pecuniarily interested in two ways in having appellants win this case and in driving the appellees from the market:

1. They were furnished by or belong to a combination which benefits pecuniarily by any reverse to their great rival, the Merrick Co. The testimony as to this combination is as follows:

Appellees' witnesses:

Hopkins, p. 719, q. 26; Knox, p. 433, q. 69; A. G. Baldwin, p. 515, q. 63 to 65, 96; G. P. Baldwin, p. 550, q. 44, 45, 110; Bartley, p. 527, q. 55 to 62, 101, 102, 128 to 131; Devin, p. 538, q. 16, 17; Whitmore, p. 582, q. 74 to 78; Fischer, p. 642, q. 100; Root, p. 660, q. 53 to 55; Le Boutillier, p. 624, q. 5 to 26, 48 to 58, 60 to 63, 66, 76, 77, 90.

Appellants' witnesses:

Brightson, p. 163, xQ. 65, 66; Cox, p. 192, xQ. 25 to 31, 35 36, 101; Hornblower, p. 217, xQ. 33 to 36; Miller, p. 225, xQ. 4 to 7.

2. Two at least of the Combination Companies are like Coats interested in overthrowing the Merrick Co. and winning this suit, by relieving their own trade marks of O. N. T. and Mile End, from the attack which appellees make upon the Coats' trade mark, as appears on pages 107 to 133 of this brief.

Other threads than the combination and appellees' threads are, or recently have been, upon the market. Why did not appellants call some of these *disinterested* parties, the Kerr people, the Chadwick people, the Orrs and McNaught people, Brooks, Williston, Hadley, people connected with the A. T. Stewart thread, with the C. S. I. Clark thread, the J. R Clark thread, or even dealers in those threads? Appellees did so Why did they not call the disinterested consumer? Appellees did so. Appellants omitted to call the best class of witnesses—consumers. They called only six of the next best class of witnesses—retailers—two or three of whom are discredited. The great body of their witnesses are of the third and least informed

class, to wit, manufacturers, agents and jobbers, who rarely, if ever, see either a spool of thread or a consumer, and who are besides pecuniarily interested in the result of this litigation.

On the other hand, appellees called only twenty-eight witnesses to answer appellants' thirty-eight depositions, and twenty-two out of these twenty-eight were disinterested retailers or consumers; one was an agent of the hostile Willimantic Company, one was appellees' agent.

Below are the witnesses on both sides classified as to interest:

Appellants' 17 Witnesses on First Prima Facie Case:

Hugh Auchincloss, U. S. Agent for Coats.
Henry B. Auchincloss, U. S. Agent for Coats.
C. D. Beale, Northwest Agent for Coats.
Joseph Bellfield, Gen'l Supt. for Coats.
Webster Hazelwood, New England Agent for Coats.
Andrew S. March, New England Agent for Coats.
Stephen Haff, Salesman for Coats.
Herbert R. Taft, Salesman for Coats.
John W. Farrington, Salesman for Coats.
Frederick Smith, Agent in effect for Coats.
Thomas Russell, Gen'l Agent for John Clark.
Theo. M. Ives, Gen'l Agent for Willimantic.
Frank M. Smith, Retailer.
Loring Sears, Retailer (confessed cheater).
Frank E. Stacy, Retailer.
P. J. O'Keefe, Retailer (untrustworthy).
William E. Bowker, Retailer (untrustworthy).

Appellees' 11 Witnesses Answering Appellants' First Prima Facie Case:

L. R. Hopkins, President of Merrick Co., formerly retailer.
Alexander Knox, Disinterested retired jobber and agent.
Edward A. Le Pard, Retailer.
A. G. Baldwin, Retailer.
Geo. P. Baldwin, Disinterested jobber.
Wm. G. Pierce, Retailer.
James B. Whitmore, Retail and wholesale.
William Wiesmann, Retailer.
J. H. Bartley, Coats' jobber and retailer and consumer.
Philip M. Devin, Retailer and Consumer.
Daniel H. Downs, Consumer, formerly dealer.

After appellees had overthrown appellants' case, appellants began again and sought to make out another prima facie case.

Appellants' 21 Witnesses on Second Prima Facie Case:	Appellees' 17 Witnesses Answering Appellants' Second Prima Facie Case:
C. D. Beale, Northwest Agent for Coats.	Henry Cummins, Retailer.
Leroy B. Cox, Northwest Agent for John Clark. (Being an agent for each of the four Combination Cos.)	L. Abrams, Retailer.
	Morris Abrams, Retailer.
	O. C. Fischer, Retailer.
	T. W. Partridge, Consumer.
	Jesse T. Seely, Retailer.
P. V. Root, Chicago Agency for Willimantic.	Mary Abraham, Retailer.
	Caroline Jacklin, Retailer.
Walter Miller, New Jersey Agency for Geo. Clark.	Miss Jacklin, Retailer.
	W. T. Hart, Retailer.
Walter Miller, Again, New Jersey Agency for Geo. Clark.	Mrs. W. T. Hart, Retailer.
	Alex. Paton, Retailer.
John B. Crosby, Detroit jobber for Coats' thread.	Harry L. Andrus, Retailer.
	Geo. Le Boutillier, Retailer.
Albert R. Logie, Buyer for Coats' jobber.	L. R. Hopkins, Retailer and president.
Geo. E. Brightson, New York, jobber for Coats' thread.	P. V. Root, Willimantic agent.
	H. Phillips, Merrick agent.
Jos. E. Dallon, Jobber for Coats' thread.	
Stephen A. Frost, Jobber for Coats' thread.	
William F. Willis, Jobber for Coats' thread.	
Jno. H. Lyman, Jobber for Coats' thread.	
Henry A. Young, Hireling of Coats. (Agents for Coats.)	
Chas. A. Koch, Hireling of Coats. (Agents for Coats.)	
G. Ford Carpenter, Hireling of Coats.	
Cornelia A. Brown, Hireling of Coats.	
Annie Miller, Hireling of Coats.	
Sarah E. Hornblower, Hireling of Coats.	
J. N. Hornblower, Clerk of Coats.	
P. J. O'Keefe, Recalled retailer (untrustworthy).	
Wm. E. Bowker, Recalled retailer (untrustworthy).	

Appellees' twenty-eight witnesses, who are disinterested almost to a man, some of them even from appellants' and the

combination camp, and some dealing exclusively or principally in Coats' thread, never heard of an instance of deception or mistake, and do not think such a thing likely, and they give their reasons; as that the name is plain and ever the test; that the embossment indicates nothing of source; is never referred to as a distinguishing mark of Coats; that in addition to the name the star is a distinguishing mark of Merrick's, etc., and these same opinions are given sometimes on the cross examination of Appellants' witnesses and sometimes on the cross examination of Appellees' witnesses, who have been examined on their direct on other subjects.

If these mere opinions one way and the other were counted, there are probably more for Appellees' view than for Appellants but mere number is of little significance. **Appellants' witnesses were pecuniarily interested.** Appellants' witnesses were pecuniarily interested. Appellees' were not, and in matter of mere opinion this is of the highest significance.

These mere opinions, couched in substantially similar language, will not be further alluded to, but it will be assumed that the Court, after becoming familiar with the product and the history of the features of resemblance or difference, and the purpose and circumstances of their adoption and use, and their actual effect upon the consumer and retailer, will judge with its own vision and intelligence.

In *Leggett Co.* vs. *Finzer*, 128 U. S., 182, complainant used a five-pronged tin star, with hole in centre, as a proprietary mark on plug tobacco. Defendant used a round paper label with a red central star of different size and color and surroundings from complainant's. The Court denying relief, said:

> "The judgment of the eye upon the two is more satisfactory than evidence from any other source as to the possibility of parties being misled, etc."

So in *Clotworthy* vs. *Schepp*, 42 F. R., p. 62, where defendant, as here, used his own trade mark, the Court said that ocular inspection is more persuasive evidence of dissimilar labels, etc., than affidavits of witnesses claiming to have been deceived.

In Columbia Mill Co. *vs.* Alcorn, 40 Fed. Rep., 676, Judge Butler, (1889), McKennan concurring: after showing that the

complainants had no exclusive right to the word "Columbia," goes on to say:

> "Flour brands are so numerous (nearly every miller and dealer having his own) and the general shape and style so similar, in consequence of their use on similar packages (barrels) that purchasers must necessarily observe them with some care to distinguish one from another. A passing glance cannot be relied upon, and we suppose is not. In this respect, the case differs from those in which trade marks are ordinarily involved. Looking at the plaintiff's, and that of the defendant's, which is said to resemble it, with the attention necessary to discriminate between the thousands of flour barrels in common use, the difference must be seen immediately, even by the most inattentive buyer. The two or three witnesses who say they were misled, must have been especially unobservant."

The bill was dismissed.

D.

Appellants' Modern Instances.

The bill of complaint contains most elaborate allegations of all sorts of actual deception, and gives the impression that Appellants had in hand or knew, or at least had heard of an unlimited number of actual instances of deception and mistake, which had caused the filing of the bill. But not one such is attempted to be proved. They are all more modern than the bill. The bill was filed in May or June, 1883, and Appellants, with nearly five years in which to find or manufacture instances, and after trying fourteen times to get one proved so that it would stay proved, would, we believe, if they were asked, almost admit that they had failed to make out a single one.

There are three classes of these attempts:

1. Attempts to prove apparently *bona fide* mistakes or deceptions where there was *bona fides* in the consumer, and the seller cheated. These seem to have been selected with especial reference of the ability of the seller *to* cheat in spite of the honesty of the thread.

2. Mere hearsay statements of retailers or of alleged Merrick agents that they were dealing in Merrick thread because cheaper and resembling Coats', or recommending it for these reasons.

3. And lastly, despairing of getting any other sort, downright hireling testimony—of bands of boys and women hired

at so much a day to go from shop to shop and, asking for Coats', to take what they got without looking at it, and which meant—get Merrick if possible.

Appellants alleged instances of deception will now be considered.

IT WILL BE SEEN THAT IN NO INSTANCE IS THE MERRICK THREAD OR ITS SIMILARITY TO COATS' THREAD CHARGEABLE WITH DECEPTION.

The Keokuk Deception Case.

Although there is good authority in the books for the proposition that it is not necessary for a complainant to prove actual deception, yet the Appellants in this case were unwilling to leave their cause in any such predicament, and they began at the outset, and continued through their two sets of *prima facie* proofs, to offer evidence intended to be of instances of deception. Christopher D. Beale, general agent for Coats' thread in the Northwest was Appellants' first witness in their first set of *prima facie* proofs. Beale is the Coats' agent who gets up the instances in some quantity. With one single exception, they are all dated after the filing of the bill. They are made ready as the case goes along, the earliest of definite date, the one now about to be examined, being dated in February, 1884, and the latest in December, 1887. Beale certainly arranged and constructed each of these, and he probably arranged and constructed others.

He is examined on July 2, 1884, and after stating his agency, the amount of Coats' cotton sold yearly by him in four States as 2,500,000 dozen, and after identifying "Complainants' Exhibit, 200 Yard Spool Heads," as those used for eight years past on Coats' 200 yard spools, he is asked and answers as follows:

"11 Q. Do you know in the market a spool cotton sold by the Merrick Thread Company?

A. I have seen such a cotton.

12 Q. When was your attention first called particularly to the Merrick Thread Company's spool cotton?

A. I have known the Merrick spool cotton for a number of years; my attention was especially called to it on the 2d of February, 1884.

13 Q. Where was this?

A. Keokuk, Iowa.

14 Q. Please state what occurred at the time and place mentioned by you which called your attention specially to the matter?

A. I was in a retail dry goods store talking with the proprietor upon the different merits of the spool cottons; he drew my attention to the label on the end of the Merrick spool cotton, saying at the time it was a very easy matter to substitute for Coats' cotton; to prove what he had said, in my presence he sold a lady four spools of cotton; she wanted Coats'; he put in one spool of Coats', three spools of Merrick; at that time the deception was not discovered; I asked him if he did not think it would be returned; he said no, as he had often done so before; the only object he had in substituting Merrick for Coats at that time was to show me how easily the consumer could be deceived.

* * * * * *

32xQ. In your answer to Q. 21 you speak of some difficulty you had in distinguishing spools kept in a cabinet, by reason of your near-sightedness; who kept the cabinet?

A. William Wiseman & Co., Keokuk, Iowa.

33xQ. Is Mr. Wiseman the "proprietor" you referred to in your answers to Q. 12 to 14, inclusive?

A. Yes.

Assuming for a moment that this narrative is a true one, (which it is not, as will appear), let us examine it.

1. It nowhere appears that the woman was allowed to look at the spools.
2. It does not appear but that as soon as she looked at them she saw that there were three Merrick's and one Coats', and having tried the Merrick thread found it the better, and so did not return it.
3. If she did not see them, it does not appear but that she recognized Merrick's the moment she opened the paper containing them, or began to use them.
4. And it does not appear but that they were in fact returned.

Mr. Wiseman (following the story and assuming its truth) was not deceived. He knew just what he was doing, to wit, giving the woman one Coats' and three Merrick's when she "wanted Coats," a thing simple enough to do by wrapping them up in paper, more or less in or out of the view of the customer. Such a deception would be a deception by the seller, and not by the thing sold, but the story does not make out that the woman was deceived either by the seller or the thing sold.

Beale also is asked and answers as follows:

"21 Q. Please state what your own experience has been in regard to

the difficulty of distinguishing the said spools of the said two manufacturers?

A. The difficulty that I had was in the same place, at Keokuk; being a little near sighted it became difficult for me to distinguish in the cabinet where they kept their cotton, the difference between Coats and Merrick, with the light they had in their store."

Now it is quite natural for a nearsighted man in a poorly lighted store to distinguish with difficulty in a cabinet *any* two spools of cotton. See Phila. Co. *vs.* Rouss, 40 F. R., 585, on incompetency of "partially blind" people to distinguish, &c. The difficulty was probably increased by the fact that Beale was the General agent in the Northwest for Coats' cotton, and swearing in the interest of his employers and his own pocket.

Keokuk is a long way from New York, but Appellees brought this Mr. Wiseman, the proprietor, to New York, from Keokuk, and being sworn for Appellees he says as follows:

"37 Q. Christopher D. Beale, in a deposition given by him for complainants, on July 2d, 1884, said as follows:

(Here follows Beale's story, as related in his evidence Q. 12 to 16, 21, and xQ. 32, 38, and the question to Mr. Wiseman continues):

Did any such incident or occurrence take place as is narrated in answer to Q. 14, between you and Mr. Beale or anybody else?

A. No, sir.

38 Q. Did you ever say to Mr. Beale, or anybody else, that it was an easy matter to substitute Merrick's for Coats' thread?

A. No, sir.

39 Q. Did you ever sell to a lady who wanted Coats' cotton some spools that were partly Merrick?

A. No, sir.

40 Q. Did you ever say that you had often done such a thing?

A. No, sir.

41 Q. Did you ever take any means whatever to show Mr. Beale, or anybody else, how easily a customer could be deceived?

A. No, sir.

42 Q. What should you say of a person who should intentionally wrap up Merrick's thread for Coats', when the customer wanted Coats'?

A. It would be a fraud.

43 Q. State whether, in your opinion, it is possible to do so, if the seller were disposed, whether the substituted threads were Merrick's or any other make?

A. Oh, they can do it; but they would bring it back; they can do anything; they could do up a package of buttons instead of the thread desired, if they tried—a card of buttons.

44 Q. Please look at the spool threads in Deft's. Ex. No. 48, and

state whether you recognize in said exhibit samples of the various threads you have mentioned in your deposition as they are sold in the market?

A. Yes, I do; I have also sold Clark's Sterling Thread, of which I see a sample in the box; also Clark's C. S. I."

The above evidence is a clean and explicit denial that any such transaction as narrated by Beale ever transpired. And Mr. Wiseman is a man of substance and of standing in his community and entirely disinterested.

"1 Q. What is your name, age, residence and occupation?

A. William Wiseman; 29 years of age; reside in Keokuk, Iowa; I am senior partner in the firm of William Wiseman & Co., Keokuk, Iowa, dry goods merchants.

2 Q. How long have you been a merchant there on your own account?

A. Eight years the first of last September.

3 Q. State whether you are a man of property and mention briefly to what extent?

A. Yes, sir; I own two farms, one of which I let out, the other I superintend myself; I own real estate in the city of Keokuk, besides personal property.

4 Q. Do you hold any office of trust in your city?

A. I am treasurer of the Keokuk Business Men's Association; I am director of the Keokuk Fair Association, and of the Keokuk Hotel Association."

The whole story of deception was a pure fabrication by Beale.

Beale, at Q. 15, says he called this incident to the attention of his principals. He did not, and his own words show it, for he was recalled a little while ago to say that Mr. Wiseman swore falsely, and as evidence of this testified to two facts which are not disputed:

1st. That he was in Keokuk and probably at Wiseman's store on Feb. 2, 1884.

2d. That he wrote the following letter to his principals about ten days after:

"ALBORN HOUSE, DES MOINES, IOWA,
Feb. 10, 1884.

MESS. AUCHINCLOSS BROS.

Gents: Enclosed find report of towns visited to date; all look well but Peoria. The snow was entirely gone in the part of Ill. visited and trade very dull. In this section it is all froze up yet, and snowing to-day. Trade dull here but every one preparing for a good Spring business. Hope they may not be disappointed. The outlook good for Coats cotton, Willimantic, Kerr and Merrick making a strong fight. **I see Merrick spool has the Nos. the same as Coats'. Have they a right to that spool?** Shall reach St. Paul the last of the week.

Yours respectfully,

C. D. BEALE."

But these two facts don't prove anything whatsoever about the incident of alleged deception, for he did not "call *that* matter to the attention of his principals." These two facts were the basis of truth upon which Beale grafted the fictitious circumstances of alleged deceit.

The facts are Beale found the Merrick thread on sale in Keokuk, noticed the embossed numbers on the spool, thought the Coats people had a perpetual exclusive right to that, and wrote his principals accordingly. That is the whole of it. Auchincloss Bros. ought to have replied that that embossment was the subject of an expired patent, and that the Merrick Thread Co. and the rest of the world had since April 5, 1877, a perfect right to use it.

So much for the first of appellants' instances of deception. Not only was there no deception by the thread shown even if every word of the Beale story is true, but no such transaction ever occurred.

It may be noted that Beale in his deposition gives his opinion that the Merrick is likely to deceive, but Beale is Coats agent, is near-sighted and deals only with unbroken packages and gives no reasons for his opinion. Mr. Wiseman, who is not near-sighted, who deals with the consumer, who sees and handles the spools, and who has no interest in the case, says he don't think the Merrick is likely to deceive, and he gives his reasons for his opinion, and they are good reasons. (See 7 Q. to 36 Q. and 119xQ. to 129xQ.)

The Providence Deception Case.

Frank M. Smith is a retailer of fancy goods including spool thread in Providence, and is one of the five or six retailers called by appellants. He was examined Dec. 9, 1884, went into business for himself in April, 1883, and began to deal in Merrick's thread two or three months afterwards; "bought a full assortment" of Merrick's. While he had this Merrick thread in stock he had also "two or three or three or four" numbers of Coats', he don't remember which, and he found it difficult to dispose of Merrick's because, as he says, "not popular, and not giving satisfaction in some instances," which turn out to be when he gave it away. So he "ceased buying Merrick's."

Being asked whether Merrick's would not be likely to be mistaken for Coats' by ordinary retail customers, he says:

"A. I have given unintentionally Merrick's thread for Coats'—**the way I found it out was by the customer returning Merrick's thread—and reminding me of the mistake.**

21 Q. Did the customer inquire for Coats' thread at the time of purchase?

A. They did.

22 Q. Did you, yourself, make the mistake of delivering Merrick's thread for the Coats'?

A. I did.

23 Q. Did the customer notice the error at the time, or early afterwards?

A. Not until the next day.

24 Q. Have you, yourself, made this error in more than one instance?

A. Not to my recollection; I would not have known that if it had not been returned.

25 Q. When you had inquiries for Coats' thread, and have not had the numbers desired, have you ever filled orders with corresponding numbers of Merrick's thread?

A. Frequently.

26 Q. Have any of the customers ever detected the fact that Merrick thread had been given them instead of Coats', as far as you know?

A. Only once, to my recollection.

27 Q. Now, what is your opinion as to the probability of ordinary retail customers being deceived by the similarity of the spool heads and labels into thinking that the Merrick thread is the Coats'?

A. Well, I can only speak for myself in regard to that; that probably nine times out of ten, being in a hurry, I would be as liable to take one for another, as the same thread, unless I took particular notice; I speak for the time since I have had it.

* * * * * * *

28xQ. Unless you took notice of what?

A. Unless I took particular notice, and took the spool and read it.

29xQ. On taking the spool to read it, what would you look at to determine whose make it was?

A. To look at the name on the sqool.

30xQ. Is that what the name is there for; that is, to enable people to tell whose make the thread is?

A. Well, I should suppose so.

* * * * * * *

75xQ. You say that you have filled orders for Coats' thread with Merrick's of the same number, when you had not the former, and that with the exception mentioned by you, the substitution was not detected so far as you know; then I presume that you cannot swear but that these customers discovered that they had Merrick's thread?

A. I cannot, with the exception of the two out of six previously mentioned.

76xQ. Nor can you swear that they were not satisfied with the substitution, can you?

A. I couldn't answer for that."

The Merrick Thread Co. and the four combination thread makers, Coats, Willimantic and the two Clarks, furnish cabinets to the retailer in which to keep their respective threads separate. The name of the thread is conspicuous on the cabinet. The Merrick thread is intended to be, and almost universally is, kept alone in the Merrick cabinet, and so on with the other threads. But this Mr. Smith not only kept the two or three numbers of Coats' thread and his full assortment of Merrick's all together in the Merrick cabinet, but the "cabinet was kept in a dark place behind the counter," and not conveniently in sight of customers (see 53xQ. to 61xQ.). Now under such discouraging circumstances is the Merrick thread fairly chargeable with this "mistake?" Owing to the darkness and a wilful confusion of the goods, Mr. Smith makes a mistake. Appellants, of course, seek to make the Merrick spools responsible for it. Well, the customer was not deceived. She saw that two of the spools were Merrick's and not Coats', and returned them the very next day. If they had not been given to her in a paper (66xQ.) she would doubtless have corrected Mr. Smith's mistake on the spot.

Mr. Smith could have in the same way wrapped up butternuts for the woman.

Appellees desired to call this woman as a witness, but could not learn from Mr. Smith who she was (see 63xQ.). Mr. Smith is then asked "64xQ. How do you suppose she discovered that it was Merrick's thread she had received?" and he answers: "A. By the name Merrick's; **that was the first time I noticed the similarity of the spools.**"

The incident happened in February, 1884, after Mr. Smith had been dealing in both the Merrick and the Coats for at least six months (see xQ. 61, 62 and Q. 2), and *this was the first time he had noticed the similarity.*

At 95xQ. he admits that he can tell Merrick's from Coats' by the difference in size, and at the distance of across the examination room.

Plainly there was no deception here attributable to the spool.

The Pawtucket Deception Case.

Joseph Belfield is the General Superintendent at Pawtucket, R. I., of Appellants' thread manufacturing business in this country, carried on there under the name of the Conant Thread Co. James Coats, one of the Appellants' is President of the Conant Co.

Mr. Belfield was asked and answered as follows, speaking of the first time he ever saw one of Merrick's spools of 200 yards six cord thread:

"7 Q. Please state who showed it to you then, and what occurred at the time?

A. It was shown to me by Mr. James Coats, one of the complainants; Mr. Coats told me that he had some of the Merrick's 200 yards spools, and that if I would go with him to his office he would show them to me; on opening his desk he took two spools of thread from some samples, and in handing them to me I thought they were J. & P. Coats'; I told him that it was Merrick's spools he was going to show me; he looked at the spools and said those were Merrick's; **as soon as I got them into my own hands I saw they were Merrick's.**

* * * *

9 Q. Then I understood that, although you had been familiar with spool heads used by the complainants, yet upon being shown the 200 yard spool heads for six cord thread used by the defendants you were deceived into thinking they were the complainants' spool heads?

A. I was deceived for the moment."

Now, assuming that Mr. Belfield in December, 1884, gave an exact account of what happened a year and a half or more before, still he was only "*deceived for the moment*" and, as he says, "*as soon as I got them into my own hands I saw they were Merrick's.*" While in Mr. Coats' hands, in transitu, on the wing as it were, Mr. Belfield was "deceived for the moment."

Inasmuch as articles of this character are taken into the hand, if the consumer wishes to see whether the number and make are what are desired, this incident would seem to be good evidence of the difference of the spools and marks, instead of their similarity, for as soon as he got them into his hands he saw they were Merrick's, and Mr. Coats, as soon as he looked at them, said they were Merrick's.

The charge of unfair trading gains no support from the evidence of these two Arcadians, one an appellant and the other appellants' superintendent.

The Merrick thread even when on the fly can deceive the most willing and interested appellant and witness only for a moment.

The Boston Deception Case.

William E. Bowker, of Boston, is the second of the five or six retailers called by Appellants. He is shown to be unworthy of belief, to have been hired to give his testimony, and to have tried to bribe Mr. Pierce (who became Appellees' witness), to support him in his falsehoods.

Bowker was examined in December, 1884, and thinks his first purchase of Merrick thread was made "a year ago last March or April," which, if true, might place this story a month prior to the filing of the bill. He says Wm. G. Pierce, of Boston, sold him his first purchase of Merrick thread, and that it was received from the Merrick Thread Co. Then he is asked and answers as follows:

"16 Q. At the time of negotiating this purchase of the Merrick thread was anything said between you and Mr. Pierce in regard to the spoolheads and labels and their likeness to those of any other manufacturer, and if so, what was said?

A. I told him it looked very much like Coats', and he replied and said, you can sell it half the time for Coats'; the same conversation also took place when buying from him again this Summer.

17. Q. What was there about the Merrick thread that made it look very much like Coats'?

A. The formation of spool, the label and raised letters or figures, without very close scrutiny, one would be very apt to pick it up and sell it.

20 Q. Please state in detail what your experience is, if any, in regard to the liability of people purchasing a spool cotton to be deceived into supposing Merrick Co.'s spools and thread are those of Coats'?

A. I have passed it out unintentionally when in a hurry waiting on customers, and having several other customers to wait upon.

21 Q. Have you done this frequently?

A. Quite.

22 Q. Have you in these instances shown these spools to the customers in the store at the time of sale?

A. I have picked it up and laid it on the show case while picking up a piece of paper to wrap it up again, where the customer stood.

23 Q. How has your error in regard to the thread become known to you, if at all?

A. By being returned; some before being used and some the empty spool.

24 Q. How often has this been done?

A. I would not say just now how many times.

25 Q. About how many times?

A. I could not say, but I should think as much as a half a dozen anyway, may be more.

26 Q. Do you keep the Coats' and Merrick's thread in the same cabinet, in your shop?

A. We have kept it, also Clark's.

30 Q. Has it ever happened in your business that any custumers of yours have purchased any of the Merrick spool cotton of you, and have afterwards made any complaints about it, supposing it to have been Coats'; if so, what has occurred?

A. I had; one lady got a spool and returned it, a few weeks ago, and wouldn't have anything in place of it.

31 Q. Have any of your customers who have purchased the Merrick complained of its quality, and if so, what has been said?

A. I have had them buy it and bring it back as they weren't acquainted with it and had never used it before.

Cross-examined

33xQ. In the cases where you unintentionally sold Merrick's thread for Coats' thread, what did your customers call for?

A. Coats'.

34xQ. When customers want Merrick's, what do they ask for?

A. Merrick's.

35xQ. Do you mean that in each case they call for the thread they want by the name of the maker, do you?

A. Usually.

36xQ. If they want the thread of any particular maker, they call for it by the maker's name, do they not?

A. Usually.

37xQ. What do you mean by usually?

A. By usually I mean that they ask for the kind of goods they want.

38xQ. By name?

A. Well, now, they do not always call goods by their right names; if you mean spool cotton, they do, and we always give them what they ask for, unless we make a mistake, and when trading with our customers we tell them if anything not right, bring back and we'll rectify it.

43xQ What was the name of the lady referred to by you in answer to question 30?

A. I could not give the lady's name, as I do not know the names of half a dozen of those who trade with us.

47xQ. When customers ask for Clark's thread, which do you give them, John's or George's.

A. I cannot say; we usually give them the white spool, as we keep the most of it.

49 R. D. Q. Do you have much inquiry for Merrick's spool cotton by name?

A. No, sir.

50 R. D. Q. Do you remember ever to have had such an inquiry?

A. No, it sells very slow, and that is why we have allowed ourselves to get out of other cotton, to run that off to get rid of it."

The transaction above detailed is denied with great particularity by Mr. Pierce himself, but before reciting this denial, attention is called to some features of this Bowker deposition.

1. In answer to xQ. 38, he says: "We always gives customers what they ask for unless we make a mistake." In answer to xQ. 47, he says as follows:

47xQ. When customers ask for Clark's thread, which do you give them, John's or George's?

A. I cannot say; we usually give them the white spool, as we keep the most of it.

2. It appears by answer to Q. 30, if anything appears by it, that Bowker sold a woman a spool of Merrick's thread, that Bowker *says* she supposed it to be Coats', but returned it and wouldn't have anything in place of it. How he knows what she supposed does not appear, unless he caused her to suppose it was Coats' by stealthily wrapping up Merrick's when she asked for Coats'. At all events she discovered what make it was, returned it, and was so angry at Bowker's cheating that she wouldn't have anything in place of it.

3. Bowker, at Q. 16, says he told Pierce on this occasion in 1883 that the Merrick's looked very much like Coats', and that Pierce then told him that he could sell it half the time for Coats'. And then he says: "The same conversation also took place when buying from him again this summer." It is submitted that a repetition of this same conversation is in itself improbable, entirely aside from Pierce's distinct denials.

4. In answer to Q. 17, where he is asked what there is about the Merrick thread that made it look very much like Coats', he mentions "the formation of the spool" first in his statement of similarities. Now, it is well known that Merrick's differs from Coats' in that particular more widely than any other spool except the first and unsuccessful Kerr shape.

5. It also appears, 26 and 13 Q., that Bowker kept his Merrick and Coats' and Clark's thread in the Merrick cabinet, thus exposing himself to mistake when, as he says, Q. 20, "In a hurry waiting on customers and having several other customers to wait upon."

6. It appears, Q. 23, 24, that on his substituting Merrick's for Coats' the Merrick's was returned, having been recognized as Merrick's. The cheating of Bowker is thwarted by the thread.

The Wm. G. Pierce referred to by Bowker was called by appellees. He is in no way connected with appellees, and it was then two years since he had sold any thread for them or anybody. But he had sold Coats', Clark's, Willimantic and Merrick's; at wholesale and retail, and had seen a large amount retailed to consumers (Q. 3, 4, 5, 6.)

When he gave his testimony he was the agent for more than twelve different respectable mercantile houses situated all over the country.

Mr. Pierce then states in detail the course he pursued in trying to sell Merrick's thread (Q. 10.)

His attention is called to the testimony of Bowker above referred to and he is asked and answered as follows:

* * * * * * *

"21 Q. Did you ever, by any expression or intimation, seek to convey to the mind of either Mr. Bowker or Mr. O'Keefe that there was any resemblance between the spools or spool heads, or marking, or labeling, or outward appearance or dress of the Merrick thread and Coats' thread?

A. No, sir.

22 Q. Did you, in your conversation with either of these men, refer in any way to the spool, spool heads, labels, marking, or outward appearance of either of those threads?

A. Nothing.

23 Q. Would anything you said warrant, in your judgment, any conclusion on the part of either of those men that the Merrick resembled the Coats in its spools, spool heads, labeling, marking, outward appearance or dress?

A. Nothing.

24 Q. What did you speak of and refer to in these interviews in connection with the thread?

A. The quality of the thread, the strength of the same, smoothness of the same, price, discount, cabinets, wrappers and cards.

25 Q. Did Mr. Bowker make any remark to you to the effect that Merrick's "looked very much like Coats'"?

A. Nothing.

26 Q. Do you, in fact, think it does?

A. I do not.

27 Q. When Mr. Bowker says that you showed him samples or specimens of the Merrick article, is he mistaken?

A. He is.

28 Q. What was the cabinet given to be used for, in your dealings as agents for the Merrick Thread Co.?

A. To keep the Merrick thread in.

29 Q. Was it furnished for the purpose of keeping any other in than Merrick's?

A. No, sir.

Cross-examined.

98xQ, What did he say comparing Coats' with Merrick's in any of this series of conversations?

A. He said he thought they were all about the same thing—one as good as the other.

99xQ. You could not undertake now to give in detail, all he said or all you said in these conversations as to comparisons between Coats and Merrick thread, could you?

A. I can give every word that was said.

100xQ. Would you be willing to swear that Bowker never said to you that Merrick's thread looked very much like Coats'?

A. He never did."

The above testimony is as explicit a denial by Mr. Pierce of the statements of Bowker as can be framed, and it carries the conviction of truth on its face, as Mr. Pierce did when on the witness stand.

But Mr. Pierce, it will be noted, not only denies that he used any expression such as Bowker attributed to him, but he testifies that in his opinion there is no such similarity as would lead to mistaking one for the other.

* * * * * * * *

"48 Q. State whether, in your judgment, retail buyers using such care as people buying spool thread by the spool do in fact use, would be likely to make the mistake of taking Merrick's thread for Coats' when they wanted Coats', by reason of any resemblance between the two?

A. No.

Cross-examined:

208xQ. If a number of instances were testified to where retail buyers had made the mistake of taking Merrick's spools for Coats', when they wanted Coats', is there such difference between the spools that, in your judgment, such a mistake would be impossible?

A. It would be impossible if the salesman looked at the spool when he took it from the box; the only way that it could happen would be if the salesman might be looking one way with his eyes, and feeling the other way with his hand, which would be just as liable to happen with any other thread besides Coats'; it would not happen if he was looking at what he was doing. as the Merrick

thread is written in plain black letters on a gold ground, whereas the Coats looks entirely different."

After Bowker had been examined by appellants he told Pierce what he had sworn to, and tried to get Pierce to corroborate him, but Pierce told Bowker that he could not do so, for the reason that Bowker had testified falsely, and that Bowker knew it was false. The evidence is as follows:

* * * * * * * *

"53 Q. Did he ever tell you that he had been examined as a witness in this case?

A. He has.

54 Q. Did he tell you the substance of what he had sworn to touching what occurred at the sale of Merrick thread about which you have been asked?

A. He did.

55 Q. State whether he solicited you to support him in his statements as testified to?

A. He urged me to go and see Coats & Co., in Boston, and said he could get me $50 for coming to New York and testifying in respect to their thread, as they were having a lawsuit with the Merrick Thread Co., and urged me to come on and get the $50, and do all I could to injure the Merrick Thread Co., as he had just been paid $35 for going to New York and testifying in respect to buying the Merrick spool cotton of me.

56 Q. You say that he told you what he had testified to in New York touching the sale; did you state to him whether you regarded his testimony as truly given or not?

A. He told me what he said he testified to in respect to the sale made by me to him of Merrick thread, and I told him he knew that he had told that which was not true.

57 Q. You have reference in this answer to Bowker's assertions regarding the resemblance of Merrick's to Coats' spool thread, have you?

A. I have reference to his assertion as to selling the Merrick thread for Coats' thread, on account of the looks of the spools and labels, not the cotton.

58 Q. When you gave him to understand that he had testified wrongfully, what reply did he make in substance, if any?

A. He replied that "Well, he had got his $35 anyway, and he would do what he could to injure the Merrick Thread Company."

59 Q. And you declined to give the testimony desired, did you?

A. I told him I could not testify as he had and tell the truth; that if I should go on for Coats & Co. I should do them more harm than good, as what he testified to was false. that is, representing my sale to him.

60 Q. Have you any interest in the issue of this suit?

A. Nothing.

61 Q. You have come here from Boston at the request of the defendants, without subpœna, to testify what you know regarding the subjects about which you might be questioned, have you?

A. Yes.

* * * * * * * * *

117xQ. Up to what time have you had business dealings with Mr. Bowker?

A. Up to about the first of this month, two or three weeks ago; in fact, I am dealing with him all the time; that is the last sale I refer to.

118xQ. When was it that he told you that he had been examined as a witness in this case?

A. Just after he returned from New York, after being here as a witness.

220xQ. After the conversation you had with Mr. Bowker, where he told you what he had testified in this case, which conversation you have referred to in your testimony, was the subject of his testimony talked of again between you?

A. It was casually brought up.

221xQ. When and how often?

A. Soon after the first conversation he brought it up, urging me to go to New York in the interest of the Coats Co., and that he would even go and see them and get me paid a big price if I would go."

Bowker was recalled by complainants.

1. To reiterate the substance of his former testimony as to the Bowker-Pierce interview.

2. To say that he "has no remembrance" of soliciting Pierce to corroborate him.

3. To deny that Pierce told him that he, Bowker, knew he had testified falsely.

4. To state he has no recollection of saying what Pierce in other answers attributed to him.

5. To try to mix up Washington street with Hanover street as the actual place of the interview.

The deposition is very weak and just such testimony as might be looked for from a man who had actually done and said what Pierce says he did and said. (See Q. 4 to 15.)

It is submitted that the alleged statements of Pierce as reported by Bowker are a pure fabrication.

The Worcester Deception Case.

P. Joseph O'Keefe is the third of the five or six retailers called as witnesses by Appellants, and his testimony is, like Bowker's, untrustworthy, though he did not, like Bowker, seek to bribe Wm. G. Pierce to corroborate him.

O'Keefe seems to have changed his business connections during the last dozen years something like twelve times,and just now he is doing a millinery business in the name of Mrs. O'Keefe, at Brockton, Massachusetts. This appears in O'Keefe's second deposition (xQ. 42, 89), for, like Bowker and Beale, he swore for Appellants upon both their first and their second attempts to make out a *prima facie* case. The theory seems to have been that the more unreliable the witness, the more times he must swear. Another noteworthy fact as to these five or six retailer witnesses is this: although cabinets are, at some considerable cost, furnished free by the Merrick Co. for the express purpose of keeping the Merrick thread in (see Hopkins, p. 420, R. X. 1084; Pierce, p. 559, Q. 28, 29, and many other witnesses), it somehow turns out that the few retailers whom Appellants have secured as witnesses keep their Merrick and Coats thread, and sometimes other thread, all together in a Merrick cabinet, or else sell their Merrick cabinet and then keep their Merrick and Coats thread in the Coats cabinet. O'Keefe keeps his Merrick and Coats, and perhaps other, thread in the Merrick cabinet (p. 105, Q. 37).

One of O'Keefe's stories is about a little girl who, according to O'Keefe (as he, O'Keefe, has collected it from a "lady clerk" who is not examined by Appellants), is in some way claimed to mistake one of these spools for the other, the circumstances of which will be presently reviewed. On his first examination, he says he knew who the little girl was, but Appellees' counsel, by an oversight, omitting on cross examination to find out who she was, tried to repair that omission on O'Keefe's second examination. But O'Keefe couldn't then possibly tell who she was, nor who the clerk that reported the incident was, nor for whom the little girl bought the thread. Appellees' counsel had at this stage of the case no faith in any of the Appellants' deception cases, and there was much disappointment at not being able to learn the name of either of these people. The policy of an undisclosed partner in this bogus deception case seems to have been deemed the safest course.

O'Keefe reports of Appellees' witness, Wm. G. Pierce, a statement similar to that reported of him by Appellants' witness Bowker, and Mr. Pierce as flatly denies the report of O'Keefe as he did that of Bowker.

O'Keefe, in his second deposition, says he "don't think he

would believe Pierce under oath." So did Bowker. Plainly, if they did believe Pierce they confessed themselves to be falsifiers. No trustworthy witness, no other witness, is called to criticize Mr. Pierce's reputation for truth and veracity. The more such men say against the honesty of Mr. Pierce, the higher Mr. Pierce's reputation ought to be held.

O'Keefe, in the matter of the reported statement of Mr. Pierce, is asked and answered as follows:

> "29 Q. Through whom did you buy the Merrick spool cotton?
>
> A. Indirectly through W. G. Pierce of Boston, and directly of an agent traveling for the Merrick Thread Company.
>
> 30 Q. Would you explain a little more fully what you mean?
>
> A. W. G. Pierce, of Boston, had sold Merrick thread at different times, and tried several times to sell me a 100 dozen lot, saying that the cotton was so near like Coats' that customers would scarcely know the difference, and also that I would be making an extra ten per cent. I gave Mr. Pierce an order for a 100 dozen case and the firm refused to send it, claiming that Mr. Pierce was no longer their agent, and the firm sent this agent of whom I bought a 100 dozen case.
>
> 31 Q. When you say that Mr. Pierce represented to you that the cotton was so nearly like Coats' that customers would scarcely know the difference, did you understand him to refer to the quality of the thread or the get-up of the spool labels?
>
> A. He referred to both."

Wm. G. Pierce was called by Appellees and denies in detail ever having held any such conversation with O'Keefe. Mr. Pierce's testimony on this subject appears at pages of this Brief, where he contradicts similar statements made by witness Bowker.

O'Keefe being recalled by appellants says he doesn't care to change his former evidence; that Mr. Pierce's reputation for truth and veracity is "not reliable" and he "*don't think* he would believe him under oath." It is quite natural for O'Keefe to feel so after being so flatly contradicted by Mr. Pierce. No trustworthy or disinterested person is called to criticise Mr. Pierce's reputation in any particular.

O'Keefe's story about the so-called mistake of the little girl is as follows:

> "21 Q. Please give some instance?
>
> A. A little girl came into the store with a spool of Merrick's without any cotton on or any paper label on, and said, "Give me a spool of Coats' cotton like this," presenting a spool which was Merrick's spool with the raised numbers on; the clerk passed her out a spool

of Merrick's of the same number, and at the same price that a spool of Coats' would sell for.

* * * * * * * .

41 Q. In answer to Q. 21, narrating the incident of the purchase by the little girl, you say she presented a spool which was Merrick's spool, without any label or thread on it; how was this spool known to be Merrick's instead of Coats'?

A. Because she called for Coats', and we had but a very little Coats' in stock, and the young lady clerk called my attention to the fact that she had been substituting Merrick's for Coats', and I told her it was not best to do that, especially with children."

This is a very peculiar story In the first place, whatever deception there was was practised by the clerk or O'Keefe, and not by the Merrick thread. The clerk and O'Keefe recognized the little girl's spool as Merrick's, even without any label on it, or any cotton. And though the little girl asked for Coats', she was given Merrick's by the lady clerk, who knew just what she was doing. The witness being asked how the spool was known to be Merrick's, without any label or thread on it, says, at first, because the little girl called for Coats'. Now, that would appear to be a pretty good reason for thinking the spool *was* Coats' and not Merrick's. As a reason for thinking it Merrick's, it is simply absurd. The next reason he gives for recognizing the spool as Merrick's was, that he had but a very little Coats' in stock, which is also a pretty poor reason for thinking the spool was Merrick's. The third and last reason he gives for thinking the spool was Merrick's, was because the clerk told him she had been substituting Merrick's for Coats', and he told her it was not best to do that, especially with children, which is also no reason at all, but discloses the dishonesty of the clerk (assuming the truth of his statement) in substituting Merrick's for Coats', while knowing which was which, even without any label or thread on it. Don't cheat the children, says O'Keefe in substance, but you may cheat the grown people if you can, because we have more of Merrick's in stock.

In xQ. 62 to xQ. 80 of his second deposition, given as part of appellants' second *prima facie* case, O'Keefe is questioned further about this incident, and he gives as a reason for his dishonest instructions to his clerk, the following: "My directions to the clerk was not to sell the thread for other than *it was represented*, especially to children who could not see for themselves, and would rely upon the word of a clerk."

This answer plainly implies that the thread *represented* itself for what it was plainly enough, and that grown people could see it for themselves at the sale, unless the seller himself put a cheat into the transaction, as by wrapping it up before the purchaser should see it, just as appellants' hirelings in Chicago (Mrs. Brown and Miller) requested the seller to do, in order to make it easy for them to be deceived, and afterward testify about it.

It is difficult to see how the Merrick article, which asserted its source even without label or thread upon the spool, and which *represented* itself correctly unless misrepresented by the seller, can be made responsible for any part of the deception in this story.

In the second cross-examination of O'Keefe, he is asked in vain for any information which would lead to identifying either the little girl or the "lady clerk" who cheated her. The "lady clerk" is not called by appellants, and O'Keefe's testimony about it comes at second hand and is uncorroborated and he is shown to have testified falsely as to the reported statement of Pierce.

It is submitted that this story of O'Keefe is as false as his report of the statements of Mr. Pierce. A perusal of the two depositions of O'Keefe, together with that of Mr. Pierce, will produce a conviction of the utter unreliability of O'Keefe.

The Columbus Deception Case.

Herbert R. Taft is "traveling salesman for J. & P. Coats Spool Company." After stating that he has never seen the Merrick thread in the market on sale but once, he is asked and answers as follows.

"8 Q. Where was this Merrick spool cotton on sale when you saw it?

A. In Columbus, Ohio, at the store of Freeman, Haley & Morton.

9 Q. Please state whether or not the similarity between the spool heads and labels of Merrick Thread Company, shown on Schedule G, and those of Messrs. J. & P. Coats, as shown in Schedule Cx, is sufficiently close, in your judgment, as a practical dealer in spool cotton, as to be likely to deceive ordinary retail customers giving the amount of care and attention to which such customers ordinarily do?

A. I think it would in many instances.

10 Q. Have you known of any actual instances of the kind; if so, please state the circumstances?

A. I met one instance of that sort; while in the store of Freeman.

Haley & Morton, Columbus, Ohio, talking to Mr. L. C. Freeman, a lady whom I am intimately acquainted with, Mrs. George Butler by name, knowing that I was selling J. & P. Coats' spool cotton, said that she had bought some of it in that store, a few days previous, and was surprised to find that it was not as good as it formerly had been; knowing that this firm sold Merrick's thread, and did not sell Coats', I told her she was mistaken in the kind she got, and I got a spool of Merrick's from their cabinet, which, after looking at, she admitted was the sort she had purchased.

(What the woman said objected to as hearsay.)

11 Q. You say you got a spool of Merrick's and showed it to her; did the spool of Merrick's, that you showed to her, have a spool head and label similar to those shown on Schedule G?

A. The same, I think.

Cross-examined:

13xQ. It had the name of Merrick thread on it, had it not?

A. Yes, sir.

14xQ. Where did this incident happen?

A. In the store of Freeman, Haley & Morton, Columbus, Ohio.

15xQ. Were you in their employ at that time?

A. I was in the employ of Auchincloss Bros., agents for J. & P. Coats' spool cotton.

16xQ. When was it?

A. Early in November, 1884."

This is the very best instance complainants have to offer of any sort of deception, but it falls short of even reasonable proof of deception.

1. A vital part of the transaction is a report by the witness of what Mrs. Butler said which was objected to as hearsay, and Mrs. Butler was not called as a witness.

2. It does not appear that she examined or looked at the cotton when she bought it, or that she was given any opportunity to look at it.

3. It is quite probable that she did not look at it, or she would have recognized it as Merrick's as readily as she did when she looked at another spool of it. (See q. 10.)

4. The record is full of evidence that there is no discernable difference in quality between the five principal threads, the four combination threads and Merrick's, and there is much evidence that Merrick's is better than Coats', some of it from Appellants' own witnesses, as will be seen. It is therefore unbelievable that Mrs. Butler found that particular cotton "not as good as it had formerly been," and this remark of Mr. Taft stamps the story as inaccurate and improbable, especially as Mrs. Butler was not called.

5. That Mr. Taft is quite inaccurate and careless from Appellants' own standpoint appears from xQ. 29 and 30 :

"29xQ. You are familiar with the numbers of Coats' thread marked with the marks and labels on schedule C, are you not?

A. I am, sir.

30xQ. Name all of them.

A. Nos. 8, 10, 12, 16, 20, 24, 30, 36, 40, 46, 50, 60, 70, 80, 90, 100, 110, 120, 130, 140, 150, 200 ; that's all, sir."

Now Appellants insist that Nos. 110 to 200, inclusive, (which are made of three and not of six cords) are plainly distinguishable from Nos. 8 to 100, inclusive, (which are made of six cords) by the different label and embossment (p 81, xQ. 115). Yet this witness, who has been nine months traveling salesman for the Coats people, and sold the Coats thread for years before, thinks the marks and labels on all the line of Coats' 200 yard thread to be the same.

6. Taft says that Mrs. Butler, on looking at the Merrick spool he showed her, recognized it as like the one she had previously bought. How could she recall in her mind the appearance of the first so as to pronounce the second to be like the first, without having observed for herself the difference in appearance between the first and Coats'? This is another very suspicious feature of Taft's story.

It may be safely concluded that Taft drew largely on his imagination in preparing this tale, and coming from a witness in Coats' pay, and without the supporting evidence of Mrs. Butler, it should be rejected as untrustworthy.

The Fitchburg Deception Case.

Loring Sears is the fourth of Appellants' retailer witnesses. He has dealt ten years in Coats' thread, and two years in Merrick's. This man confesses himself to be a cheat, and his story relieves the Merrick thread from all charge of deceptive appearance, so far as this witness' evidence is concerned.

He is asked and answers as follows :

"13 Q. Have you had any knowledge, in the course of your dealing in these two makes of spool cotton, of the Merrick spool cotton being mistaken for Coats' spool cotton by retail purchasers?

A. Only twice, I think.

14 Q. Please state those cases?

A. One was returned to one of my clerks; one was returned to myself, stating they wished machine cotton, and what I had given them was basting cotton.

15 Q. Did you give any instructions in your store, to your clerks, as to what spool cotton was to be sold on inquiry from customers?

A. My instructions were, if Coats' was called for, and we were out of the number, to substitute Merrick's.

16 Q. Has that frequently been done?

A. It has.

17 Q. Did you ever know of the substitution being observed or noticed at the time?

A. No, sir.

18 Q. And do I understand you to mean that the two instances that you referred to in the previous answer were the only instances where the substitution was called to your attention by the purchasers afterward?

A. Yes.

19 Q. Why did you put in Merrick's thread on orders or request for Coats'?

A. Because I made more profits on Merrick's.

20 Q. And did you retail the Coats' and Merrick's at the same price?

A. I did; both at five cents a spool?

21 Q. Why didn't you put in Kerr's thread, for instance, when you did not have the required number of Coats'?

A. Because they would readily notice it from the shape of the spool.

23 Q. Have you ever substituted, or attempted to substitute, Kerr's spool cotton for Coats'?

A. Never, except explaining the difference.

25 Q. In answer to Q. 15 you say that your instructions were, if Coats' was called for and you were out of the number, to substitute Merrick's; have you more recently given any different instructions, and if so, since when?

A. Since having the spools returned my instructions were not to substitute it, for fear of hurting my spool cotton trade.

26 Q. How would it hurt your spool cotton trade?

A. Customers calling for Coats' and then getting something else, would not be likely to come after Coats' again.

27 Q. How long is it since you gave these last instructions not to substitute Merrick's for Coats'?

A. I should say that it was over six months ago.

28 Q. Did you ever know of any person connected with the Coats' business itself, being deceived by the similarity of the Merrick spool heads and labels?

A. I have.

29 Q. Who was it, and where did the occurrence happen?

A. Coats' traveling agent, and in my store?

30 Q. State what occurred at the time?

A. He opened the case and took out a spool of black cotton and said he did not think it looked as well as their cotton ordinarily, not

being such a good color or shade, and I called his attention to its being Merrick's.

31 Q. And was it in fact a spool of Merrick's that he had taken up and criticised?

A. It was.

32 Q. Did he suppose it was Coats' when he took it up?

A. I should say, from the manner he took it out of the case, that he did.

33 Q. Did he say anything about having so supposed at the time?

A. He spoke as being surprised that he should be mistaken himself.

34 Q. What was the agent's name?

A. Hazelwood, I think."

Thus Sear's confesses (Q. 13 to 23) that he actually gave instructions to his clerks to substitute Merrick's for Coats' if they didnt't happen to have the number of Coats' asked for. He says he did this to get the little greater profit on Merrick's, that he didn't substitute Kerr's (without explanation), for Kerr's was so different it would be readily noticed. In other words where the "customer would herself readily notice the difference from the shape of the spool" then he never fails to honestly "explain the difference." It is clearly implied, and intended to be both by witness and Appellants' counsel, that when Merrick's was substituted he refrained from explaining the difference. He explains the difference when he thinks no explanation is needed, and withholds the explanation where he would have it appear explanation is needed. But the Merrick thread required no explanation after all, for the cheating of the witness was discovered by the customer and the Merrick thread returned both to his clerk and to himself (see Q. 14 above). And his cheating was so uniformly discovered and the Merrick thread recognized and returned that he recalled his instructions for fear of hurting his trade, and of losing his sale of Coats' thread (see Q. 25, 26, 27 above).

With such a confessed record of cheating for such a trivial pecuniary profit, Mr. Sears is not to be believed in his little narrative about Webster Hazelwood's cheating himself as told in Q 28 to 34, above.

1. Hazelwood is in the New England Agency for Coats' thread, and it is extremely unlikely that he should criticise Coats' thread which he had sold to a customer.

2. Hazelwood himself had already sworn as hard as he could

for Appellants and said not a word about this incident nor is he recalled to support it.

3. When Hazelwood's testimony comes to be examined, we shall see that it is of a very oblique and devious character.

4. Sears kept the Merrick thread in a Coats' cabinet, together with his Coats' thread (see 7 1xQ.) This, of course, helped Sears to cheat his customers, and helped Hazelwood (if the incident ever occurred) to cheat himself, but Sears recognized at once that the thread was Merrick's although it was taken from a mixture of the two in Coats' cabinet, for he says so in answer to Q. 30, and Hazelwood admits, Q. 33, that he was surprised that he should have made the mistake.

5. Sears in such a cheat that after being provided, free, with a handsome Merrick cabinet for the Merrick thread, he sells it to one Simonds, and transfers the Merrick thread to the Coats' cabinet to help him in his unsuccessful cheating (xQ. 71. 77).

6. Out of the entire list of witnesses on both sides, sixty-three in number, and almost every one of whom is asked on direct or cross, by Appellees' counsel, the question as to the utility of the embossed numeral, Sears is the only one that gives a dishonest answer on this point, and he lugs Hazelwood into this cheat also (see xQ. 51, *et seq*).

One word more. Merrick's spools are a good deal longer and a little narrower not only than Coats' spools but than any other of the standard threads. Now, it happens that basting or 3 cord 200 yard cotton is wound on just such long slim spools. There is much testimony, elsewhere considered, as to this distinguishing size and shape of the Merrick article, and some as to its being taken on this account for basting or 3 cord cotton. Now, this is just what Sears says happened with his customers (see Q. 13, 14, above). They thought it was basting cotton, which is 3 cord cotton, and evidently for the above reason. No other reason is anywhere alluded to in the testimony.

It is submitted that the testimony of Sears shows no deception except by Sears himself; that Merrick thread did not deceive but asserted its source in spite of Sears' cheating, and that Sears makes himself out to be the cheat, instead of the Merrick thread.

The New York Hireling Deception Case.

At last appellants, despairing of legitimately finding a single *bona fide* instance of deception, boldly try to manufacture some outright. The people employed to do this work are referred to as hirelings, because they were hired at so much a day or by the week to go about asking for Coats' thread and to get Merrick's. To accomplish this a band of boys was sent out in Lake City, Minnesota, a couple of women in Chicago, and a Mrs. Sarah Hornblower in New York city. Mrs. Hornblower is mother of J. N. Hornblower, an employee of appellants in New York city, and who does a good bit of swearing for appellants on his own account, as well as gets his mother to go out on this deceitful errand. She was called on January 4, 1888, as one of the twenty-one witnesses of appellants' *second prima facie* case. Her story is that at the request, through this son, of one of the Auchincloss Bros., who are virtual appellants, she went about during the first fifteen or sixteen days of December last, "it may have been longer," visiting "twenty—perhaps a few more," of the little retail stores on 1st, 3d, 6th and 8th avenues, asking for Coats' thread, with the purpose of receiving Merrick's. This is what she understood from her son was wanted, and that it was wanted for Mr. Auchincloss' lawyers (p. 151, Q. 3, 13, 81, xQ. 20, 39, 73 to 75). The net and total result of this enterprise, occupying at least 16 days, appears on *her* examination to have been that at one single place out of the twenty or more, to wit, at "182 3d avenue, at the store of L. Abrams," having asked for three spools of Coats' she received two of Coats' and one of Merrick's, being Nos. 80, 60 and 40 respectively. Her testimony is as follows:

"3 Q. State whether you have lately visited any stores in the city of New York for the purpose of purchasing spool cotton, and if so, at whose request?

A. I have, at the request of Mr. Edgar S. Auchincloss, of the firm of Auchincloss Bros.

4 Q. State what spool cotton you asked for on the occasions I have referred to?

A. Coats' cotton.

5 Q. State whether having asked for Coats' cotton you received any other make of cotton, and if so, when and where?

A. I did, on one occasion, at 182 3d avenue; the name was L. Abrams, between 16th and 17th streets.

6 Q. On what date was that?

A. On Tuesday, December the 6th.

7 Q. State what you asked for; describe the person who served you, and the manner in which the purchase was made of the spool cotton you refer to?

A. I asked for Coats' cotton; I was served by a boy of about eighteen; he picked me out the numbers I asked for, 60, 80 and 40; he wrapped them in paper and gave them to me; I put them in my ulster pocket and opened the parcel after I reached home.

8 Q. Did you see whose name of spool cotton the spools you bought on this occasion at 182 3d avenue were, before they were wrapped up, or examine them at that time?

A. No.

9 Q. Did you know whose manufacture they were until you unwrapped the parcel at home?

A. No.

10 Q. Will you produce the spools you bought on that occasion?

A. I do so; they are three spools, No. 40 of the Merrick Thread Co.; No. 60 and 80 of J. & P. Coats.

11 Q. State whether these spools have been in your possession since purchasing them on December 6th, and whether they are the same three spools that were wrapped up and that you bought at 182 3d avenue on that day?

A. They have been in my possession ever since and they are the same spools that I bought at that place.

12 Q. How did you pay for them?

A. Three five cent pieces to the boy who wrapped them up.

The three spools produced by the witness are offered in evidence by the complainant's counsel and marked Complainant Exhibit "Hornblower's Spools 1, 2, 3," T. H., Sp. Exr., Jany. 4th, 1888.

13 Q. At whose request did you come here to testify?

A. Mr. Edgar S. Auchincloss."

It will be seen that this is a very minute and detailed narrative, stated with great care, and can hardly be inaccurate. But it was not only inaccurate, but in all the details tending to show deception by the thread it was totally false. First, it will be observed, Q. 7, that Mrs. Hornblower says she was served by a boy of about 18, who, as she says, himself picked out the spools and wrapped them up, with out her seeing, Q. 8. xQ. 24, what they were that she recognized one of them was Merrick's by the name as soon as she opened the paper at home, xQ. 27, and that if she had looked at the spools in the store at the purchase she would have recognized it in the same way. Therefore, even if her story is all true, there was no deception by the Merrick spool. The evidence shows that it is not very unusual for one thread to be given when another is asked for, the latter being not kept, or the particular number exhausted, or the former being cheaper. John Clark, Jr., was

thus given for Coats to a couple of Appellants hirelings in Chicago, and one Clark's was given for another by Appellants' witness Bowker, p. 53, xQ. 47, though one is on black spools and the other on white in white thread. The evidence is overwhelming that, excepting Merrick's, which is proved to be the best, there is no difference in quality of thread of the principal makers.

But Mrs. Hornblower's story is not true. It is absolutely false. Whether she deliberately falsifies whether her son made up the package for her without her knowledge, or how it happened that she had such a package, it was impossible to prove. But the fact is, L. Abrams, of 182 Third Avenue, had not had a spool of Coats' thread in his stock for five years, and Mrs. Hornblower says she bought these two spools of Coats' and one of Merrick's there on the 6th of the preceding December.

L. Abrams, the father and proprietor, says (p. 614, Q. 6, 8 to 16, 20,) that he don't sell or keep Coats' thread, and that he hasn't kept or sold it in his store for four or five years ; that it was impossible for anyone to have bought Coats' thread there last December—it wasn't kept there ; that his principal sales are Clark's O. N. T., and that he keeps Merrick's.

Morris Abrams, the son, and only young man who ever tends the store, and the only person there besides his father and mother, says (p. 609, Q. 1 to 24,) that he is 18 years old and night clerk in the General Post Office, that he has never sold any Coats' thread to Mrs. Hornblower, or to anybody else, either on December 6th, or at any other time ; that Coats' thread has never, so far as he knows, been kept at the store, and that he has never seen a spool of Coats' thread. He also says he has never sold a spool of Merrick's cotton, and he was ready to tell how he knew that fact, though it is kept there if Appellants' counsel had chosen to inquire. Here again the people whom Appellants seek to connect with deception keep several threads in a single cabinet, two or three Clark's and Willimantic, etc., but it is noteworthy that they have a Merrick cabinet for their Merrick thread, and keep it separate from the rest Appellants' counsel satisfied himself of this at the examination of the Abrams, which was held at their store. Even if this scandalous performance were the only one brought forward by appellants, it would be enough to throw suspicion

over any piece of evidence that could be in any way connected with them. It was partly because of the character of these bogus stories of deception that attention was called early in this brief to the fact that all the instances are of a date later than the filing of the bill, and that many of them are worked up as the case goes along, and this is particularly true of the fictions that form the bulk of appellants' second *prima facie* case of twenty-one witnesses.

This instance needs no further comment.

The Frederick Smith Hearsay, Burlington, Kansas, Instance.

As evidence of the alleged unlawful resemblance of Merrick's article to Coats', appellants called several witnesses who swear to something which they *say* has been *said* to them on that subject. In connection with these hearsay cases, appellees have labored under several difficulties, such as

1. Hearsay is difficult to contradict, the words lying merely in memory and subject to so many liabilities to be inexact.

2. The hearsay cases are always located at great distances from the place of trial, involving great outlay of time and money on the part of appellees to investigate at these distant points and reply to the alleged hearsay, *e. g.:* Columbus, Ohio, Keokuk, Iowa; Worcester, Mass.; Shelby, Michigan; Boston, Mass.; Burlington, Kansas, and Chicago, Illinois.

3. It was usually difficult or impossible to learn from appellants' witnesses even the name of the person who said the alleged things. In the Frederick Smith hearsay instance no sort of clue could be elicited.

Frederick Smith was a clerk in Burlington, Kansas, of a house dealing principally in Coats' thread. Appellants moved for a commission to examine Frederick Smith founded on an affidavit by him to an alleged conversation with an alleged Merrick agent there. After reading the affidavit and knowing very well that the Merrick Thread Co. had no agent anywhere in Kansas and sold no thread in Kansas, Mr. L. R. Hopkins, the President of the Merrick Thread Co., and his counsel concluded that the story was a bogus story, that no such statements had ever been made to Smith as his affidavit recounted, that no information as to who made the statements to Smith would ever

be elicited, and that the bogus character of the story could only be thoroughly disclosed by an oral cross examination.

Appellee's motion for commission was not opposed but a strong effort was made by appellees to be permitted to cross-examine Smith orally at Burlington at appellees' own expense Appellants feared the result of such a cross-examination, opposed it vigorously, and His Honor, Judge Lacombe (reluctantly we are persuaded) denied the privilege of oral cross-examination as not consonant with the best practice. The commission issued, and Appellees' written cross interrogatories were directed almost solely toward learning who the sayer of the alleged sayings was, how he looked, or where he could be found, but no clue of any value could be elicited (see xQ. 1 to 38).

Smith's story is that in the early part of 1886, he can't give day or month, a man, he can't give his name, traveling for the Gilbert Silesia Manufacturing Co. (there appeared to be no such company), and representing himself as agent for the Merrick Thread Co (which is false), called on him, Smith, at Burlington, Kansas, and

> "desired to sell me and offered to sell me Merrick thread. He said and represented that it was very similar to and much like the Coats' spool and similar to the spools and labels of the Coats' make and so similar to the Coats thread that the difference was not easily discerned. That is, that the spools and labels were so similar to those of Coats'."
>
> "The inducement was that we could buy it for less and as the spools and labels were so nearly alike, very few people could detect the difference and we could make a better profit thereon."
>
> "The person spoken of had with him Merrick spools and he exhibited them in comparison with Coats' spools which I had, in my presence, and remarked upon their similarity and the probability of passing one for the other."

Smith evidently did not believe the bogus agent's views as to similarity, &c., for he bought no Merrick thread.

President Hopkins, of the Merrick Thread Co., was examined after this commission was returned, and he testifies that neither he nor any agent or employé of his company ever had any dealing with either Smith or his firm; that no agent or seller of the Merrick Co was ever in Burlington; that he had had thorough investigation made to learn if any agent or employé of the Merrick Co. ever sold, or offered for sale, or made any such representations as Smith swore to, with the result that no seller or agent from the Merrick Thread Co. had ever been in Burling

ton. He says, "I have used all the means that I could to find out who the man was, if anybody, and I could not trace him at all" (see Q. 1 to 14).

An examination of Mr. Hopkins' deposition will show that he was in earnest in his search, and a perusal of the depositions of Mr. Smith and of Mr. Hopkins, together with the unwillingness of appellants to have Smith cross-examined orally is convincing, especially if other efforts of appellants to obtain evidence are considered, such as that of P. V. Root and the various bands of hirelings at Lake City, Chicago and New York, that no such language was ever used to Smith by anybody. The unknown third party was never called by appellants or discovered by appellees.

Contradiction of this mythical story could go no further.

The two Root Chicago Deception Cases.

The Willimantic Linen Co. is one of the four companies of the combination, hostile to the Merrick Thread Co., first as a business rival; second, as member of the combination which the Merrick Company will not join; and third, because its trade mark is in danger under the attack made in this case upon the Coats' trade mark by appellees, for fraudulently selling three cord thread as and for six cord, in connection with the trade mark sued upon.

Theodore M. Ives is the general agent for the Willimantic Co., with headquarters in New York city. He went upon the stand for appellants and swore as hard as he could in their first *prima facie* case.

On their second *prima facie* case, Mr. Ives sent Pierre Vanderbilt Root from the Willimantic Agency for the Northwest to swear for appellants.

Pierre Vanderbilt Root is at the Chicago agency of the Willimantic Co., and he claimed to know or Mr. Ives thought he knew of two instances where the deceitful character of the Merrick spool cotton was made very evident, and under the combined urging of Mr. Ives and the Auchincloss people, who are really, as the New York *Herald* recently called them, "Spool Cotton Kings," and whose urging, therefore, is not to be resisted, Pierre Vanderbilt Root gave an account of two instances

of Merrick deception that had come under his notice, in the following language:

"9 Q. State what make of spool cotton in your experience and opinion in the appearance of the spools and labels bears the closest resemblance to Coats' spool cotton?

A. Merrick's.

10 Q. In your opinion is that resemblance so close as to be calculated to deceive customers who were not paying special attention to carefully examine the spools they purchased?

A. It is.

11 Q. Can you mention any instance in your experience where a purchaser was so deceived and obtained Merrick's instead of Coats', and, if so, state that instance?

A. I can; I have one instance in mind; that of Mrs. Partridge, of 228 South Hoyne street, Chicago; as well as I can recollect, it was about a year ago; she inquired in a store for Willimantic thread, and the dealer told her that he did not carry it, so she asked for a spool of Coats'; he gave her a spool of Merrick's, which she did not notice at the time; but afterwards discovered that it was another thread, that it was Merrick's thread.

12 Q. State whether she showed you the spool of Merrick's thread so given her for Coats'?

A. She did.

13 Q. Was anything else said in regard to the matter at the time she showed it to you?

A. I told her that I had heard of other or similar instances of where people had been deceived in the spool.

14 Q. In going around among the dealers as salesman for the Willimantic Co. has the question of similarity between the Coats' and the Merrick's spools in appearance come up, and if so mention the name of any dealer, and state the occurrence?

A. That question has come up on several occasions; there's one dealer that I call to mind speaking of the similarity of the spools; his name was O. C. Fischer, 161 North Avenue, Chicago; he was just speaking to me of people being deceived in the appearance of the spools and his being able to sell Merrick's for Coats'.

15 Q. What was his statement to you or the substance of it, as you remember it?

A. He said he was going to try to sell Merrick's thread as there was more money in it.

16 Q. And in regard to the similarity to Coats' what was his statement?

A. Said he thought he could sell it as well as Coats', because he didn't think people generally could tell it from Coats' (now I'm taking this all from memory; you understand what I mean by that); I can't swear that was the exact conversation, but as near as I can remember.

17 Q. And in the other instances what was the substance of what was said to you by the dealers as to similarity between Coats' and Merrick's?

A. Substance was about the same.

18 Q. State whether O. C. Fischer at the time of his making this statement to you had Merrick's thread in stock?

A. He had a few dozen in stock."

See also the cross-examination in which it appears that both instances are located in the Fall of 1886, that Mrs. Partridge is landlady of the house in Chicago where Mr. Root boards, that he knows Fischer well, and that Fischer at the date of the incident, 1886, had Merrick thread in stock.

Straightway after the signing of this deposition, and before Mr. Root reached Chicago, appellees' counsel got there, called upon Mr. Fischer and learned that Fischer had never had Merrick thread in stock, had never seen a spool of it in his life, and had never made any such statements about it as Mr. Root had sworn to. Mr. Fischer made affidavit to these and other facts on the spot.

Mrs. Partridge was also visited and stated that no such incident as Mr. Root had sworn to about her had ever occurred, and she also stated what did occur, and her view of the matter was put in writing and signed by her. Just what Mr. Fischer and Mrs. Partridge said in detail will be rehearsed a little later, as the one gave it upon the stand as Appellees' witness, and as the other, being too ill to be examined as a witness, afterwards expressed herself in an affidavit, but for now it will be sufficient to say that each of them contradicted, unequivocally, the entire story of Root so far as it related to them respectively.

Mr. Root arrives in Chicago a few days after Appellees' counsel and learns, on reaching his boarding house, that Mrs. Partridge has made a statement in writing and signed it, contradicting his New York testimony. Realizing the situation, Mr. Root goes to the office of the Chicago agency of the Merrick Thread Co., and there confesses the error he has made in his testimony as to Mrs. Partridge, and signs the following letter to Appellees' counsel.

"MERRICK THREAD CO.,
WESTERN AGENCY,
205 FIFTH AVENUE.
E. A. STILL, MANAGER.

"CHICAGO, ILL., Jan. 20, 1888.

"MR. WITTER, New York City.

"*Dear Sir:* Since I returned to Chicago, I have talked matters over

with Mrs. T. W. Partridge, concerning the conversation I had with her about which I testified when I was last East in the J. & P. Coats *versus.* Merrick Thread Co.'s lawsuit, and I find that I was mistaken, and I wish to retract what I testified to so far as it pertains to her being in any way deceived in the matter referred to, and you will oblige me by writing such a document for me to sign as will cover these points, and I will sign and return the same at once.

"Yours, etc.,

"P. V. ROOT."

Shortly after this letter Appellees' counsel went again to Chicago and had an interview with Mr. Root, who, in the meantime, had learned that Mr. Fischer had also denied the truth of Root's statements touching him. Upon this Mr. Root desired to make a clean breast of the whole matter and his statements were reduced to writing, substantially as dictated by him, and then sworn to before a notary after being carefully read over and considered by him. His affidavit reads as follows and speaks for itself:

"P. V. ROOT, being duly sworn, deposes and says as follows: I am the P. V. Root who gave testimony for the complainants in the above case on January 12th, 1888, in the City of New York. Before going upon the witness stand I told Samuel R. Betts that I could not swear positively to any instance of deception or to my having heard of any instance of deception. I told him that I could not depend upon my memory so as to state anything positive, and this especially as to the circumstances connected with Mrs. Thomas W. Partridge's purchase of thread. I tried to escape giving testimony, but I finally consented to give the evidence, insisting all the time that I could not be positive about this deception business. Under the questions put to me by Mr. Betts I gave evidence more positive than I meant to or than I ought to. Since returning to Chicago I have talked the matter over with Mrs. T. W. Partridge, concerning the conversation I had with her, about which I testified as above stated, and I find that I was mistaken and I wish to retract what I testified to, so far as it pertains to her being in any way deceived in the matter referred to, that is to say: She was not deceived into taking Merrick's thread, thinking it was Coats', nor did she, on inquiring for Coats', receive Merrick's, not noticing it was Merrick's, or afterwards discover it was Merrick's.

"The similarity between Coats' and Merrick's manufacture that I referred to in my testimony was the fact that they both have the number indicating the size of the thread stamped in the wood, making them look more alike than the other black and gold labled spools look like Coats'; I understood that the Coats people had a patent for the use of those numbers on the spool, and was informed that the Merrick people were infringing on that patent; that was why I thought they looked similar; black and gold circular labels, with the name of thread, that is, the maker's name, the number of the thread,

the length of the thread, and the quality; that is to say, Best Six Cord all disposed in circular lines, have been used on six cord thread by all principal makers ever since I have been in the business, so that such a label has become a badge of six cord thread.

"I wish to be understood, also, as no more positive about the Fischer incident of my testimony than about the Partridge incident; I arrived at the conclusions above stated, and swear to them, without any other inducement whatever than my desire to do right, and I called upon Mr. E. A. Still, agent of the Merrick Thread Company in Chicago, for that purpose, on January 20th, 1888, and at his office wrote to Mr. Witter the letter hereto annexed, or, rather, signed it.

"I did not attempt to be positive in my talk with Mr. Betts before the examination, and told him several times I could not be positive, either about the persons or incidents, and I did not intend to be positive in my testimony, nor did I understand that my testimony was positive; I relied upon nothing but my bare memory, and so informed Mr. Betts.

"I have read over this affidavit myself, and find it to be correct in every particular.

(Signed) P. V. ROOT."

The deposition of Mr. Root formed part of appellants, second *prima facie* case. When defendants came to answer that case, and reached this Root episode they first called Mr. Fischer as a witness and his testimony was as follows:

"3 Q. Is it a part of your business to sell spool thread at retail?
A. Yes, sir.
4 Q. What spool thread have you sold at retail, referring to 200 yd. thread of six cord?
A. Coats', Willimantic, Kerr's, Clark's, Chadwick's.
5 Q. How long have you been selling these threads, or some of them, at retail?
A. About twelve years.
6 Q. You did not mention Merrick's thread among the threads that you had sold; have you never sold Merrick's thread?
A. No, sir.
7 Q. Has it ever been kept at your store?
A. No, sir.
8 Q. Have you ever bought any of it?
A. No, sir.
9 Q. When did you first see a spool of Merrick's thread?
A. On January 13, 1888.
10 Q. Who showed it to you, and who were present at the time?
A. E. A. Still showed it to me and Mr. L. R. Hopkins; Mr. Witter and Mr. Still were present.
11 Q. Is there any other person by the name of O. C. Fischer except yourself at 161 North avenue, Chicago?
A. No, sir.

12 Q. How long have you sold dry goods, including spool thread, at that place?

A. About four years and a half.

13 Q. Which of the spool threads that you have mentioned are you now selling?

A. Coats' and Willimantic.

14 Q. Prior to January 13, 1888, did you ever have a conversation with any person regarding the similarity or dissimilarity of the Merrick and Coats' spools or labels.

A. No, sir.

15 Q. Did you ever, at any time, say that you didn't think people generally could tell Merrick's from Coats'?

A. No, sir.

16 Q. Did you ever say that you thought you could sell it as well as Coats', because you didn't think people generally could tell it from Coats'?

A. No, sir.

17 Q. Did you ever speak to anyone of your ability to sell Merrick's for Coats', or of people being deceived in the appearance of the spools?

A. No, sir.

18 Q. Have you ever said anything which would bear such a construction, or which in substance was the same as the questions 14-17 inclusive?

A. No, sir.

19 Q. Are you acquainted with P. V. Root, of Chicago?

A. Yes, sir.

20 Q. In a deposition given for complainants recently, this Mr. Root was made to state in substance that you had made such statements to him as are embodied in questions 14-18 inclusive; have you seen Mr. Root within a day or two, and if so, state whether or not he has told you that he was mistaken in the testimony he gave regarding you and your statements touching the Merrick and the Coats thread?

A. I saw him last on Tuesday, February 28th; he told me that the evidence he gave in New York was not positive evidence, and that he was merely under the impression that it was I who had told him so.

21 Q. Did he also tell you that he had been subpœnaed to give testimony in this case this week?

A. Yes, sir; he told me so.

22 Q. How are the various threads you have dealt in asked for by customers?

A. They are asked for by their names.

Cross examined:

51xQ. Have you any Merrick's thread in stock now?

A. No, sir.

91xQ. What was said on the subject the first time you talked about it?

A. I cannot remember the exact words, but think I said: "Rooty, I am afraid you have got yourself into a scrape"; words to that effect;

then I asked him how he came to testify to that effect; he then told me what he told me afterwards again that he had not given positive evidence, he being under the impression that it was I who had made certain remarks to him; well, I think that covers it all; we had other conversation, but I cannot remember it all; that is a digest of it; he also told me last Tuesday that he was subpœnaed.

92xQ. Did he not tell you that somebody said what he had testified was said by you in regard to selling Coats' for Merrick's, and similarity between the two spools, and that he thought it was you when he gave his testimony, or words to that effect?

A. Well, according to the previous question there, he told me that he was under the impression; that's the way he got out of it."

It will be seen from the above evidence of Mr. Fischer that he denies explicitly having had any conversation whatsoever with Mr. Root, as to the similarity or dissimilarity of Merrick's and Coats' thread, that he never saw a spool of Merrick's thread until long after the alleged Root interview, and that the first spool of it he ever saw was after Root gave his testimony in New York.

Mrs. Partridge was too ill to be examined as a witness (see Root, p. 658, Q. 29–30). Mr. Root, however, was subpœnaed by Appellees and rehearses her contradiction of his testimony as she stated the contradiction to him, and says he believes himself mistaken (see Root, Q. 17 to 25). Her affidavit contradicting Root's statements is also offered in evidence in support of Root's final renderings and of the facts. This affidavit is as follows:

MRS. THOMAS W. PARTRIDGE, being duly sworn, deposes and says as follows: I am twenty six years old and live at No. 228 South Hayne street, Chicago, and Mr. P. V. Root is one of my boarders. I have never been deceived into purchasing Merrick's thread for Coats' thread or taken one for the other by mistake, or purchased one thinking I was getting the other, or afterwards discovered that I had some other thread than I thought I had purchased. Sometime ago, perhaps a year or more, I remember asking for thread, I think for Willimantic or Merrick's thread, and being unable to get it; and I well remember that the clerk told me that they did not have that thread, but he let me have another kind which he said was just as good, explaining that it was a different thread but that he could recommend it as a good thread. I understood when I took the thread what make it was, and I was not either then or any other time in any way deceived. Spool threads are sold, asked for and known by their names, and I don't see how any one could mistake Coats for Merrick or Merrick for Coats, because the name is plainly printed upon each in the usual place. I can't recall the store where the above incident occurred, but think it may have been at Hodge's.

MRS. T. W. PARTRIDGE.

The testimony of Mr. Root, retracting his evidence given for appellants, is found at page 653 et seq. He thinks he never intended to be "positive" about these instances; don't think he was very positive. Theo. M. Ives, the general agent for the great Willimantic concern, one of the combination, ordered him down to Mr. Betts' office to give testimony for complainants, and down he went. The "Spool Cotton Kings" must be obeyed. He seems to have struggled against it, especially just before being examined. We believe Mr. Betts thinks he himself did not unduly urge on the witness. The responsibility of this outrageous testimony must, therefore, be borne by the appellants and by the Willimantic Company. Mr. Root's testimony of retraction is clear and detailed, and is found as above stated, but particularly at Q. 9 to 51. Some credit is due to him, perhaps, for the honesty which he exhibited. But none is due to appellants, for after this entire and detailed disclosure, after having managed to put in two *prima facie* cases, of 17 and 21 witnesses, respectively, the second one under guise of rebuttal, and when they found their whole fabric of testimony on infringement tumbling about their ears, appellants sought, on the cross-examination of this very Root, to start in on a third *prima facie* case, but failed.

This evidence of Root, Fischer and Partridge is instructive in several ways:

1. It shows how easy it was for appellants to have anything sworn to, which they deemed desirable by the class of pecuniarily interested witnesses that forms more than nine-tenths of their entire testimony, to wit: Agents, salesmen, employees, or jobbers of appellants, or of one of the combination concerns, or, as in the case of the retailers, Bowker, O'Keefe and Sears, of men who show themselves to be untrustworthy.

2. It shows the difficulty in some instances of thoroughly overthrowing the fabricated story. If Mr. Root had not feared the consequences to himself he might not have called upon Mr. Still and written to Mr. Witter, and the situation would have been more nearly one of conflicting testimony.

3. It shows the utterly unscrupulous character of appellants' attack upon appellees' business, for Mr. Root in effect says there is no similarity between the two threads except what is due to the embossed number, and as regards that he thought defendants were infringing on an existing patent of complainants. He says on that subject:

"The similarity between Coats' and Merrick's manufacture that I referred to in my testimony was the fact that they both have the number indicating the size of the thread stamped in the wood, making them look more alike than the other black and gold labeled spools look like Coats'. I understood that the Coats people had a patent for the use of those numbers on the spool, and was informed that the Merrick people were infringing on that patent; that was why I thought they looked similar."

Root, as the Court has seen, is not the only one of appellants' witnesses who, in the hands of appellees' counsel, has admitted the use of the numbers in the wood to be the only point of resemblance between the two brands, a point entirely disregarded by the trade and consumers as having no significance to identify the maker or the source of the thread, as is overwhelmingly proved by appellees' witnesses and some of appellants'.

4. It shows the danger of relying upon any testimony of appellants' witnesses offered to swear to instances of deception.

The Lake City, Minnesota, Hireling Deception Instance.

As part of their second *prima facie* case appellants called three witnesses in Lake City, Minnesota, Henry A. Young, Charles Koch and G. Ford Carpenter, in support of the allegation of infringement.

Henry A. Young and Charles Koch are partners in the firm of C. F. Young & Brother, agents in Lake City for the sale of the Coats' thread, which they sell to the exclusion of all others. (Young, p. 269, Q. 10; Koch, p. 280, Q. 12, xQ. 25, 26.)

Up to November, 1887, this firm supplied the other retail dealers in Lake City with Coats' thread, and by means of this trade and their own sales to consumers, the firm was just about able to sell in a year, two thousand dozen of Coats' thread and so secure an additional discount of nine

per cent. under the rules and regulations of the four combined thread companies, Coats', John Clark, Jr., George Clark, and the Willimantic Company.

If the firm failed to sell two thousand dozen it failed to get the nine per cent. additional discount. And the more it sold over two thousand dozen before January 1, 1888, the more it made in the way of discount. Nine per cent. discount on two thousand dozen amounts to about ninety dollars. (Young, p. 275, xQ. 66, 67, 73, 74; Koch, p. 280, Q. 12, xQ. 28 to 33, and 47.)

In this situation of affairs, and on October 30, 1887, Harry Phillips, an agent of the Merrick Thread Company for the State of Minnesota, visited Lake City and sought to sell the Merrick two hundred yard six cord thread to this firm of C. F. Young & Brother. He talked to this end with Henry A. Young and Charles Koch, members of the firm. He had with him, and exhibited as he always did, samples of the Merrick thread and of the threads of the four combination companies, including Coats. He recommended the Merrick thread as better than the Coats, the thread for which this firm were agents. In the presence of Young he tested and proved the superiority of the Merrick thread over the Coats in three different ways; proved its superiority to the satisfaction of Young, who moreover made tests himself, which resulted in favor of the Merrick thread. Young, however, said their firm could not just then put in the Merrick thread because it was near the end of the year, and if they should sell another thread along with Coats' they would lose just so much sale of the Coats thread and be in danger of losing the nine per cent. discount on the six months' sales, ending January 1st, 1888. Young stated, however, that later on they would put in the Merrick thread, and he told Phillips to go to his neighbors, retailers, Seely & Buck, Anderson Bros., Raymond Hanisch and M. O. Kemp, and sell this Merrick thread to them. Mr. Phillips did so at once. (Young, p. 275, xQ. 66, 67, 73 to 75 to 81, 83, 86 to 90; Koch, see his cross examination, p. 281: Phillips, p. 690, Q. 1 to 17, xQ. 43 to 46.)

Both Mr. Phillips and Mr. Young agree that this was the substance of all that was said and done at the interview with Young. On the same occasion Phillips went to the counting room or office of the firm at the end of the salesroom, and

recommended the Merrick thread there to the partner, Charles Koch, who attends to the financial and bookkeeping department of the business. Koch says that he told Phillips it was all the firm could do to sell the two thousand dozen of Coats' before January 1, 1888, and that the firm could not afford to try to introduce another thread. Koch says that Phillips then "made a statement to the effect (I cannot recall the exact words), that we could use the Merrick's thread, together with the Coats', there not being much difference in the label and appearance of the spools. But I told him that would not sell the Coats' thread for us." (Koch, p. 280, Q. 12, 13.)

Phillips, being called for appellees, swears that he made no such remark and used no language that could bear any such construction. (Phillips, D. R., p. 690, Q. 3 to 5.)

Phillips went out of the store of C. F. Young & Bro. and sold Merrick thread to the other dealers in Lake City (Phillips, p. 694, xQ. 43 to 46).

C. F. Young & Brother, thus finding themselves in danger of losing their nine per cent. discount on two thousand dozen because the neighboring dealers were now selling Merrick thread instead of buying Coats' thread from them and selling that, publish in the *Graphic Sentinel* of Lake City, on the 15th day of November, 1887, the following advertisement:

> "BEWARE OF FRAUD ON J. & P. COATS' THREAD!
>
> Several manufacturers of thread are imitating J. & P. Coats' SPOOLS, and the fraud can only be detected in closely looking for the name on the printed label of the spool. See that *J. & P. Coats'* name is on every spool."

Young in his evidence says he referred to Merrick's thread, and he gives the following reason for publishing the above notice:

> "Our firm handles said Coats thread exclusively, and we inserted that notice for our own protection. A German customer called at the store one day and said her daughter was very particular to have her get Coats' thread and no other kind; since the last kind of thread which she got in another store, which looked like Coats' thread, was not satisfactory" (Young, p. 268, Q. 6).

It was not Mr. Young but a clerk who told Mr. Young that the German woman reported her daughter's getting some thread (it nowhere appears what thread or whence) which looked like Coats' and was not satisfactory, but Young admits on cross-examination, that the fear of losing the discount was

his motive for publishing the notice (Young, p. 277, xQ. 88, 89).

On November 21st C. F. Young & Brother sent a copy of the Lake City *Graphic Sentinel* containing the "Beware of Fraud" notice to Auchincloss Brothers, appellants' agents in this country, and virtual appellants, and in reply thereto Auchinloss Brothers wrote C. F. Young & Brother on Nov. 29, 1887, a letter reading as follows:

"OFFICE OF AUCHINCLOSS BROTHERS,
P. O. Box No. 2. 47 and 49 WHITE STREET.

NEW YORK, Nov. 29, 1887.

Messr. C. F. Young & Bro.,
Lake City, Minn.

Dear Sirs: We have your favor of the 21 inst. and carefully note contents. You require to buy 220 doz. thread before 31 Decr. to earn bonus 2,000 doz. in the year. We have a 6 spool work box at 5 cts. less 6 % for the box, samples of which we express you to-day, by the same express we send you electro. of spools that will look well in the advertisement which you have placed—"Beware of Fraud," etc. Please send us a bill from this paper for a month's insertion of this "ad." We express you to-day "prepaid," 5,000 small cards and some new French s. cards just out, which we trust you will use to advantage. We have a suit vs. The Merrick Co., for piracy of J. & P. Coats' trade mark—now in the courts. For two weeks from Dec. 20, we have time to introduce new testimony —If your Mr. Young can testify to the fact that customers are deceived into the purchase of the Merrick thread by its similarity to Coats' spools—or if he can find anyone who has so been deceived—if they will make memo. of time, place and party so selling or, better yet, if they will call on those selling Merrick's at retail and asking for Coats', receive part of their request in Merrick's, we will pay the expenses of such witnesses to New York and return, with such compensation for time and trouble as may be deemed fair and just, should Mr. Young find it convenient to his business to come here between Dec. 20 and Jan. 3rd, we will also make him this offer; should no such witness be available at the moment, if you can select some reliable party (woman) who can try those keeping Merrick's with this in view, you can pay her on our account $2.00 p. dy. for a week, to thoroughly test the dealers.

The attempt of the Merrick Co. to secure an introduction to the public by copying Messrs. J. & P. Coats' spool head, is a species of trading that should meet with general condemnation, and we ask J. &. P. Coats' friends to assist us to suppress.

Yours truly,

AUCHINCLOSS BROTHERS."

The new fraud advertisement appeared on Dec. 27, 1887, and some weeks preceding, in the *Graphic Sentinel*, as directed and paid for by Auchincloss Brothers, and below is a copy of it:

> "Beware of frauds on J. & P. Coats' best six cord thread, white, black and colors, for hand and machine. When buying this thread see that J. & P. Coats' name is stamped on every spool."

This reading matter was accompanied by two cuts showing each the label and embossed end of a No. 50 spool of 200 yard six cord J. & P. Coats' thread bearing the name, quality, length and number of the thread in the usual manner.

C. F. Young & Bro., apparently unable to secure a woman to do this degrading work, as directed by the Auchincloss letter, employed a lot of boys to go to the very people to whom they, a few weeks previously, had recommended Phillips, the Merrick agent, to sell his Merrick thread, and instructed these boys to endeavor, while asking for Coats' thread, to receive Merrick's, and "say nothing to outsiders about it." (Auchincloss letter, Koch, p. 279, Q. 3, 22; Carpenter, p. 288, Q. 13, xQ. 44, 45, 58.)

Four boys, Carpenter, Gardner, Dempster and Frank Carpenter, were thus employed for a good many days, and plied the dealers over and over again, seeking, while asking for Coats', to get Merrick's, and seeking not to know during the transaction what they received. One little boy, twelve years old (Carpenter, xQ. 47, 48) was among the number, but he did not succeed. Only one instance of success is testified to, to wit, by G. Ford Carpenter, who says that he tried Seely & Buck three or four times, asking for Coats', and one time "got Merrick's" (Carpenter, Q. 6.). That at the time Seely wrapped up this Merrick thread he didn't tell Carpenter what he was giving him, and he did not see whose make it was before it was wrapped up, that is, he did not examine it (Carpenter, Q. 8, 10); but he nowhere says that as a part of the transaction, he did not know what make of thread the paper contained.

This Mr. Seely, a reputable merchant of Lake City, was called for Appellees and testified that he sold neither Carpenter nor any other person Merrick's thread when Coats' was asked for, without the purchaser being informed or knowing that he was receiving Merrick's. His deposition is found in pages 642 to 653, and attention is called particularly to Q. 8 to 31, 42 and 52 to 59.

A perusal of the deposition of Young, Koch and Carpenter, on the part of Appellants, and of Phillips and Seely, on the part of Appellees, will emphasize the points of the above recital and show to what unworthy means Appellants resorted in their efforts to get proofs for their second *prima facie* case.

Mr. Young, the managing business partner, and who had the notice "Beware of Fraud" published, expressed himself in his testimony as sorry for the part he took in it and states in substance that if he had understood the rights of the parties as he did when giving his testimony, he would never have published the fraud notice. (See Young, p. 271, xQ. 26, 27, 34, 35, 62, 63.)

The Chicago Mrs. Brown-Miller Hireling Deception Instance.

C. D. Beale, Appellants' "near sighted" general agent in the Northwest, and who fabricated the Keokuk deception case, set these cases up also. Mrs. Brown and Annie Miller were hired to go about in the most remote corners of Chicago to ask for Coats' thread and receive what they got, hoping, of course, to get Merrick's. Beale hired them to do it, gave the instructions through another person at first, and ineffectually, but afterwards personally, with singular results, and he received their reports. They went together so that *this time* there might be two witnesses to swear to each of the instances of bogus deception; but although Miller was with Mrs. Brown at every purchase, she can be made to corroborate Mrs. Brown in only one of the three cases narrated. They were engaged on this expedition four and perhaps five days, and Mrs. Brown mentions the street and number of thirty-eight places which she and Miller visited together. The total results of the duplicate enterprise of asking for Coats' and receiving what they got was that they always received Coats' except when they received six spools of Merrick's and *six spools of John Clark, Jr.'s;* which, of course, makes out John Clark, Jr.'s to be an infringement as well as Merrick's. This was a pretty bad showing, especially as the woman Miller wouldn't corroborate Mrs. Brown as to four of the six Merrick spools, two of Merrick's having been received at each of three places, making six in all; so the woman Miller

is sent alone again to one of these three places and comes back with six more Merrick spools, which she saw taken out of a Merrick cabinet as she did the other two, and says that is one way she knew they were Merrick's. Nothing but Merrick was kept in that cabinet, and Coats' was kept in another cabinet. So in all twelve Merrick's were received and six John Clark, Jr.'s, which we suppose satisfied appellants that Merrick's was twice as likely to be received for Coats' under such circumstances, as was John Clark, Jr., black spools with the black and gold and silver label.

The three places at which Merrick's thread was received were 310 West Polk street, 1662 Milwaukee avenue and 913 Clybourne avenue. These places are situated from 2½ to 5 miles from the central part of Chicago. Speaking of one of them, Mrs. Brown says: "It was an awful distance"; but appellees, although it took half a day to visit each place, examined into each instance, as will appear later on. Over and over again Mrs. Brown and Miller say that all the hunting took place between the 12th and 18th of December, and Mrs. Brown, from her memory and memorandum book both, says they began on Saturday with the directions by proxy, which were fruitless; that Beale himself gave fruitful directions on the following Monday, and that they made their final report on Thursday. Now the 12th of December was Monday, an anachronism which tends to vitiate the story of proceedings so carefully set up.

These three places referred to are little shops in the very outskirts of the city, with a small neighborhood trade, every customer known to the shopkeeper, the coming in of any stranger a notable event, places where a few groceries are kept and thread and needles, and where thread is never wrapped up in paper unless a customer requests it, which is very rare. Mrs. Brown and Miller say the thread at every one of the three places was wrapped up without their seeing or knowing what it was, so they not only refrained from seeing it but must have asked to have it wrapped up, so they might not see it, and in every instance the Merrick thread was taken from a Merrick cabinet in plain sight of everybody and with "Merrick" in great letters on the cabinet.

Now, as has been said in the discussion of some of the other alleged instances of deception, if there is any deception in these transactions, it was a deception by the buyer aided and abetted

sometimes by the seller, and in no sense a deception by the Merrick thread.

But appellees did not let the case rest at this point, but called all the proprietors and clerks from each of these three places, and in addition to the evidence from them as embodied in the above condensed narrative, they say they never sold Merrick's where Coats' was asked for without the purchaser knowing or being informed that she had received Merrick's; that they don't recollect any strangers coming into their stores for any purpose within the time referred to, that they would be certain to remember it if they had; that they don't believe strangers did come into their store so recently as that; that the two threads are readily distinguishable by the name on the label, as all threads are; that in their opinion there is no likelihood of deception. At one of the places the husband was at home about the time of the alleged purchases and saw two strangers answering the description of Mrs. Brown and Miller go up and down in front of the store and look at the Merrick signs and thread displayed in the window and finally go away, and he says they did not enter the store.

Mrs. Brown and Miller couldn't or wouldn't describe in any particular, name, sex, age or otherwise the person who served them at any of these three places except at 913 Clybourne avenue so appellees called the entire establishment.

The woman Miller says on cross-examination that when she did open the paper and look at the spools she saw without any difficulty which spools were Merrick's because the name was plainly on the spool, and that that is what she does when she buys thread for herself.

The above narrative is a correct resumé of most of the testimony of appellants' witnesses Brown and Miller and of appellees witnesses Mrs. Jacklin and Miss Jacklin, Mrs. Abraham, Mr. W. T. Hart and Mrs. Hart; this appellees testimony is found from page 669 to page 704 omitting pages 690 to 700. The whole testimony stamps the case of appellants as a case that could not prosper on bona fide evidence.

The Shelby, Michigan, Hearsay Deception Instance.

John B. Crosby is buyer and manager for Root, Strong & Co., of Detroit, jobbers of Coats' thread, selling 7 to 1 what they do of Merrick's; Crosby is one of that class of merchants called jobbers with whom appellants deal and leave a profit in their pockets, and whom the Merrick Thread Co. skip, for they go directly to the retailer; so these jobbers all over the country are ready at a moment's notice to come from Detroit or Boston or anywhere else, to say Merrick resembles Coats and sometimes to tell a story about it.

Crosby says he had a conversation with a member of the firm of Paton & Andrus, at Shelby, Mich., "A little over two years ago," which (131, Q. 9, 13) was the first time he met with Merrick's thread, "the first he heard of it." Yet he says (Q. 6) that his firm of Root, Strong & Co. began to deal in it "between two and three years ago, I think about three years." So Crosby must not be expected to be very accurate. He is asked and answers as follows:

> "11 Q. Did you have any conversation with a member of that firm at that period in regard to the Merrick thread and their dealing in it, and if so, what was said?
>
> A. I asked them why they put in new thread, or Merrick's thread; they said because it was a good deal cheaper, and that it looked so much like Coats' that their customers would not notice the difference."

On cross-examination he is asked, but can't tell, whether the remark was made by Paton or Andrus, but appellees were thankful to have the names of the two, even if Crosby couldn't tell which it was. Shelby is way up near the top of Michigan, but appellees went there learned the falsehood of the story from both Paton and Andrus, and when their day in court arrived, examined them both, and they both swore that no such remark had ever been made to Crosby or anybody else, and that Crosby, in a recent visit to them, substantially admitted to Paton that he was mistaken about what he had testified to for appellants; which disposes of this hearsay deception case.

But Appellants' counsel, not content with having tried to make out a *prima facie* case twice, try to make out a third one on the cross-examination of some of these replying Appellees,

witnesses. Mr. Paton is asked, on cross-examination, as follows, there being no warrant for it in the direct :

"38xQ. Don't you think that the Merrick spools in fact look so much like Coats' that customers would not be apt to notice the difference, unless they read the names on the labels?

A. I don't know as they would any more than they would with Clark's— some of Clark's ; part of Clark's are black spools.

39xQ. Clark's spools have not the raised numbers around the spool heads, have they ?

A. I believe not ; I never saw a customer yet speak about those raised numbers ; they always look at the name printed on the label."

The Washington, New Jersey, Hearsay Deception Instance.

Walter Miller is the O. N. T. Clark agent for New Jersey, and as P. V. Root was ordered by T. M. Ives, the Willimantic member of the combination, to swear for Appellants, so this Miller "was ordered to interest himself for the Appellants, by a member" (one Symington) "of this Clark" member of the combination (see Miller's second deposition, C. R., p. 226, xQ. 14, 15), and he does interest himself in a variety of ways, one of which appears in the following testimony from the first deposition given by him for Appellants, second *prima facie* case :

"10 Q. Can you mention any case in which the question of similarity between Coats' and Merrick's spools came up in your dealing with any retailer, and if so, give his name and state where and when it was, and what was the occurrence ?

A. Yes, sir; Henry Cunningham, of Washington, New Jersey, told me that he thought he could sell Merrick's thread in the place of Coats', because the spools looked so much alike ; this happened about a year ago ; he had at that time put in Merrick's thread in place of Coats'.

11 Q. Where did this conversation with Henry Cunningham occur?

A. In his store.

12 Q. How did you happen to be there ?

A. My duties as a salesman taking me there to drum up trade for George A. Clark & Brother.

13 Q. State whether you had been there before, and whether you knew of Cunningham keeping Coats' cotton in stock before the time of this conversation ?

A. Yes, sir; I was there before and he kept Coats' principally.

92xQ. You said that your conversation with Mr. Cumming happened about a year ago ; can you state what month it was ?

A. No, sir.

93xQ. Was it in the Fall or Winter of 1886?

A. Can't say.

94xQ. Did you make any written memorandum of your conversation?

A. No, Sir."

Miller was examined on January 9, 1888, which places the reported conversation about January, 1887, some four years after filing the bill.

The man Cunningham or Cummins, whose name is Henry Cummins, was called by Appellees, and says that he first put in Merrick thread in October, 1885, that he replenished his stock of it on December 1 and December 19, 1885, and on January 8, 1886, since which he has not put in any Merrick thread.

Miller's testimony seeks to convey the impression that in about January, 1887, Cummins has just put in Merrick's thread, which he *thought* he could sell in place of Coats'. He had already had it in stock for much over two years previous to the alleged conversation, and never has bought any since a year previous to the time of the conversation about January, 1887, and has been pretty much sold out of Merrick's for about eighteen months, all of which considerably dislocates Miller's report.

Miller says Mr. Cummins put the Merrick in in place of Coats'.

Mr. Cummins says he did not put it in in place of Coats' any more than in place of Kerr's or Clark's, which with Coats' and Merrick's he had principally sold for the last seven or eight years; and that he put it in for no other reason than that he bought it for less than these other threads and sold it at the same price. Then Mr. Cummins says that he don't recollect making any such statement to Miller, or anybody e'se, as Miller imputes to him; he would recollect it if he had; that a man named Thomas from the Auchincloss people, the virtual appellants, a few months ago came to his store and tried to have him recollect using such terms to Miller, and Mr. Cummins told Thomas he recollected no such thing.

"He asked me a good many times, trying to jog my memory, but I could not remember the conversation with Miller."

He says he sells the most of Coats' thread, so that at least he is disinterested.

It is the universal testimony of the witnesses on both sides, appearing from the very start, in the cross-examination of appellants' witnesses and the direct examination of appellees' witnesses, that all of these threads are bought, sold, advertised, asked for, known and recognized by the name alone, even in the case of the two Clarks, who have prolonged, as it were, their name, so that their thread is some known, etc., as O. N. T. Clark and Mile End Clark. This witness corroborates this testimony.

FOURTHLY. — APPELLANTS ARE GUILTY OF FRAUD UPON THE PUBLIC AND UPON EVERY HONEST RIVAL LIKE APPELLEES.

Appellants do not come into equity with clean hands. Even with a righteous case, where unfair imitation really existed and damage was in truth evident or probable, appellants could not be heard to ask for relief because they are guilty of fraud in marketing 200 yd. thread as six when it is only three cord. It is the same fraud which appellants have in trade mark cases heretofore charged as frauds upon the then defendants. (See Coats *vs.* Holbrook, 2 Sand., Ch. Rep., p 645, and Coats *vs.* Willington Thread Co., pages 731 to 735 Record herein.)

Their fraud is one of magnitude, inaugurated by them, followed perforce, though to a less extent by their three confederates, in this litigation, the two Clarks and the Willimantic Co.

Appellants' fraud consists in this that their line of six cord 200-yard thread is put upon the market in Nos. 8, 10, 12, 16, 20, 24, 30, 36, 40, 50, 60, 70, 80, 90, 100, 110, 120, 130, 140, 150 and 200, without any noticeable variation of embossment, label, spool, box, package, advertisement or commercial bill, and yet Nos. 110 to 200, inclusive, are not six cord but three. Three cord costs about one-half as much to make as six. When marked or known to be three cord it brings less than half the price of six in the market. Appellants have for years, by reason of this indistinguishable marking, charged and received a six cord price for all of this three cord thread. When the very same three cord thread is put upon spools that are distinctly marked and known to be three cord the three cord price only is received.

By reason of this conduct appellants reap two pecuniary advantages (see Hopkins, p. 716, q. 7, and p. 414, q. 1035, 1036).

1. They get a six cord price for 200 yard three cord Nos. 110, 120, 130, 140, 150 and 200 (p. 329, Q. 233).

2. From the beginning of spool thread manufacture till now there has existed a struggle between the great manufacturers to surpass each other by carrying the six cord make into higher numbers than any rival. Originally it was six cord to No. 40 only; then Orrs and McNaught advanced to 60, Clarks' to 80. When the combination of four was formed to keep up prices, all the members advanced to 100. (See p. 716, Q. 6.)

Six cord is greatly superior to three cord in every respect and more difficult to make, and the public and trade understand very well that the concern that can make six cord the highest can make all the numbers the best (see p. 716, Q. 7), and so it is that the advertisement of these appellants that all their 200-yard thread is six cord from Nos. 8 to 200, accompanied with purposely indistinguishable dress, has for years brought them increased sales in their whole line and from this source has arisen a very great profit. Appellants had done this so long that they had actually come to think it honest or else they had done it so long that they had become forgetful of it, for they actually alleged in their bill of complaint, in this case (as it existed before an amendment granted at the hearing), as follows:

> All the thread manufactured and sold by the plaintiffs, which is wound on spools of 200-yard lengths, has been, and still is composed of six separate strands carefully twisted together, thereby giving to said thread extra strength and durability, and is known as "Six Cord" thread and was by them first designated, and has always since been designated, by the plaintiffs upon their labels and wrappers and in their advertisement as "*Best* Six Cord." Some thread composed of a less number of strands than six, and known as "Three Cord" thread is also made and sold by the plaintiffs, but to plainly distinguish it from the plaintiffs' principal and generally and best known manufacture it is and has been always wound in longer lengths than two hundred yards, and is wound on larger sized spools, with labels varying in character from the "Six Cord" thread, as hereinafter more particularly set forth.
>
> The defendant company manufacture "Three Cord" thread, on spools, in lengths of 200 yards, being a thread of inferior grade and strength to that known as "Six Cord" thread, the former being a thread formed of only three strands twisted together, while the latter, as herein above set forth, is composed of six strands.

The plaintiffs manufacture and sell, on spools, in lengths of 200 yards, "none but Six Cord" thread. above set forth, and the defendants come into competition with them only as to that variety of thread, and not as to the "Three Cord" thread, on spools, in lengths of 200 yards.

Said defendant company on the spools containing said "Three Cord" thread, in lengths of 200 yards, have paper labels wholly unlike in color and design to any labels used by the plaintiffs, and the natural wood of the spool head surrounding said label is perfectly smooth, and without any decoration or embossment whatever, either of numerals or of ornamental designs, there being no simulation of or resemblance to the ornamentation or marks upon the spool-heads used by the plaintiffs.

Defendants' answer denied the truth of these allegations and set forth the fraud in most distinct and elaborate terms. (See p. 12, fol. 8; p. 13, fol. 10; p. 13, fol. 13; p. 16, fol. 32 to 34; p. 22, fol. 70 to 74.) This answer was filed January 17, 1884. The usual replication was filed April 5, 1884, and on the 16th day of January, 1885, after appellants had examined eight witnesses, H. B. Auchincloss, a virtual appellant, was offered as witness by appellants, and upon his cross-examination, appellees' counsel proved out of his mouth this six cord fraud in all its enormity. Mr. Auchincloss refused to answer certain questions on this subject, and by order of Court, his Honor, Judge Wallace, presiding, was ordered to answer them. He did answer them partially, and with great reluctance, and his deposition was closed in June, 1885.

Thereafter appellants moved upon affidavits to amend its Bill of Complaint by striking out the false allegations above referred to and denied, etc., by appellees, and their motion was denied on the spot after a long and full hearing of both sides by the Court, Judge Wallace presiding. After this denial appellants' counsel asked leave to renew the motion at the hearing, which was granted as a matter of course, especially as appellees' counsel made no objection.

The motion was renewed at the final hearing and was granted by Judge Wheeler for the reason stated in the opinion (p. 736).

Defendants, on May 26th, 1886, began to take its proofs. The president of The Merrick Thread Co., Mr. Hopkins, was the first witness, and in the course of his cross-examination by appellants' counsel and in the fruitless endeavor to connect some defendant here with the defendants in the case of Coats *v.* Willington Thread Co., the records of that cause were examined

by appellees and the following allegation was found to form a part of the Coats' bill of complaint in that case, following an allegation that defendants there marked and marketed their thread as "Coats'" thread only omitting "J. and P.," and in numerous other ways identified their spurious thread with the name of "Coats" on labels and wrappers.

> "And said thread of the respondents is of an inferior quality, *is not made of six cords, but are threads of only three cords,* and is manufactured of bad materials and contains only 150 yards to the spool and that the same is sold by the respondents for about one-half the market value of said genuine thread of the petitioners" (Coats'). (See p. 733.)

See also Coats *vs.* Holbrook, 2 Sand. Ch. Rep., p. 648, old paging to 589. Holbrook used the exact label and wrappers, name of J. & P Coats included.

The Coats people charged in the Holbrook bill, among other things:

"That the (Holbrook) spurious label, as well as wrapper state or show or would give a buyer to believe that the thread is one made from or with six cords * * * ; but in proof of such fraud or cheating the spurious thread is only made from or with three cords or strands. * *"

The Court in its opinion, referring to the fraudulent and deceptive practices of Holbrook, said, among other things, that Holbrook knew his thread

"was only a three cord thread although it was stamped and labelled 'J. & P. Coats' Best Six Cord.'"

The defendant said in defense that he told the jobber the thread was spurious. But the Court inquired, among other things, whether the jobber would be equally communicative to the customer and tell him that the thread

"was only three cord instead of six, and says the idea is preposterous."

Thus, it will be seen that these very appellants were, in the year 1851, charging the Willington Thread Co. with the very

same fraud that they themselves are now and for years have been practising with great pecuniary profit to themselves (and they have charged the full six cord price through all the years instead of the half price which the Willington Co. charged) and corresponding damage to the public, and to any honest rival, like the Merrick Thread Co., which seeks to compete with them.

The circumstances and evidences of this six cord fraud of appellants will now be reviewed in detail with references to the testimony and exhibits.

At pages 62 and 63 of the Record, the virtual appellant H. B. Auchincloss, produces, and there are put in evidence by appellants as exhibits, a one dozen box of 200 yard Coats thread of every number in the line, from 8 to 200. Nos. 8 to 100, inclusive, are six cord. Nos. 110 to 200, inclusive, are three cord. It is no easy matter for thread consumers to detect by untwisting, whether these numbers are three cord or six (see appellants' witness Cox, p. 203, Recross 113, 114). They are therefore forced practically to rely on the representations in language, marks and dress made by the manufacturer in connection with the article, as it is placed before the public.

Until the Merrick Thread Co. began in about 1884 to make 110 of six cords, and advanced until for some time past it has made 110, 120, 130 and 140 six cord, there was no six cord thread upon the market above No. 100. The public therefore was peculiarly subject to be deceived because it had no means of comparing the spurious six cord with a real six cord prior to the advance of appellees' six cord into higher numbers.

The two Clarks and the Willimantic, appellants' confederates, under the lead of appellants, went to a greater or less length in the same kind of fraud and in like manner reaped the six cord price from the three cord thread (p. 79, Auchincloss, xQ. 105 *et seq.*, and xQ. 122 to 126). And as they also have trade-marks and symbols for this line of goods as "O.N.T.," "Mile End," an Eagle, they have feared that they cannot enforce any rights under those marks, if appellants are thrown out of court by reason of this fraud. And so it is for this reason as well as because they are all three partners with appellants in the thread combination to keep up prices that they came themselves as witnesses, and sent their agents and jobbers to swear for complainants. And one thing these great agents and

jobbers, who almost never see thread on the spool, are asked to swear to, is that their respective makes are three cord in Nos. 110 to 200, that they have so understood them to be, and a few of them say that the trade so understands them, but not one of them says that the consumer or retailer so understands them. Nor does any retailer or consumer swear to any such thing. Now it is the public that is deceived, the consumer and the retailer. It is the consumer and retailer to whom are directed and before whom come the Coats' fraudulent spools with their numerous indistinguishable features and the Coats' fraudulent embossment, labels, flaps, box labels, assortment lists and other advertisements. The agent and jobber sees and sells the great unbroken cases or packages,containing many one doz. boxes of the thread (see appellants' witness Brightson, p. 159, Q. 24 to 35, xQ. 67, 74). These one doxen boxes and their contents, the spools of thread, are what the retailer and consumer see. The numerous retailers and consumers called by appellees, and some of the few retailers called by appellants, the former on direct and the latter on cross-examination, say that they have always understood the Coats' No. 110 to 200 to be six cord.

Baldwin, p. 550, Q. 39 to 44; Bartley, p. 526, Q. 54; Devin, p.540, Q. 48 to 52; Pierce, p.559, Q. 31 to 38; Whitmore, p. 577, Q. 11 to 20; Wiseman, p. 594, Q. 45; Cummins, p. 620, Q. 31, 32; Le Boutillier, p.626,Q. 28 to 31; Hopkins, p. 354, xQ. 483-4, p. 669, Q. 1; Young, xQ, p. 274,Q. 52 to 56; Beale, p. 143, Q. 8, 9, 10, 19, xQ. 34, 35.

Now, why have they so understood and therefore been willing to pay the six cord price for the three cord article, as stated by Hopkins, pp. 327, 328, 329?

Because the thread from Nos. 8 to 200, inclusive, is all (see Hopkins, p. 328, Q. 224 to 246, 250 to 256; Auchincloss, p. 72, xQ. 70 to 126, 147 to 163, 178), marketed together as follows:

1. Boxed in the same kind of boxes in shape, color and construction.

2. Every box has upon its bottom the Lion and Eagle, "Trade Mark for the United States," claimed to be and recognized as the trade mark for J. & P. Coats' Best Six Cord Spool Cotton, and those words form part of the mark.

3. Every box has the same symbol upon the cover.

4. All the boxes of 8 to 100, inclusive, and many of the higher numbers, have the following language upon the flap within the box: "J. & P. Coats' Best Six Cord Spool Cotton, White and Black, 8 to 200."

5. Boxes 8 to *110*, inclusive, and some of 120, 130, have the following on the cover: "Best Six Cord Cotton, for Hand and Machine."

6. Above *110*, these words are changed so as to read, "Best Sewing Cotton, for Hand and Machine."

7. The gulf between 6 and 3 cord is bridged by the use of Best Six Cord on top of 110, which becomes Best Sewing Cotton on 120, &c.

8. On the bottom of every box appear the words "J. & P. Coats' Best Six Cord Spool Cotton."

9. The spools, together with the labels and embossment, are exactly alike, through the line 8 to 200, except in two, Mr. Auchincloss thinks three particulars. (1.) The quality words, "Best Six Cord" on 8 to 100, inclusive, are changed on 110 to 200 to "Best Spool Cotton."*

(2.) The numeral is now omitted from the peripheral wooden embossment. (3.) Mr. Auchincloss (p. 78, xQ. 98) attributes importance to the difference in the ornamental embossing, aside from the numeral.

10. In Defendants' Exhibit No. 8, Coats' 1883 advertisement, is the following notice: "J. & P. Coats' Best Six Cord Spool Cotton in 100-dozen cases, 8 to 100, 10-doz. parcels, 8 to 200."

11. On their commercial bills and bill heads the whole line is charged as six cord, and at the six cord price.

There is nothing whatsoever anywhere about the **spools or dress** of this three cord thread, to wit: Nos. 110 to 200 by which it may be even guessed that it is not six cord, except the two features above named, to wit: the change on the black and gold label from "Best Six Cord" to "Best Spool Cotton," and the omission of the numeral in the peripheral embossment. Prior to 1874 only the first of these two features of difference existed.

There is nothing anywhere about the **boxes** containing theses pools of three cord thread by which it may be even guessed that it is not six cord except:

1. The change on the cover of *some* of those boxes of "Best Six Cord" to "Best Sewing Cotton" or "Best Spool Cotton."

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*Prior to the adoption of the embossment by Appellants in 1874, this was the only difference.

2. The omission of the "Lion and Eagle Six Cord Trade Mark" and the accompanying words from the inside flaps of *some* of those three cord thread boxes.

Now these dozen boxes go to and remain largely with the retailers, and they sometimes reach the consumer (see Le Bontillier, p. 626, Q. 26 to 28; Hart, p. 682, Q. 10).

Yet the great majority of consumers see little of the boxes except as they are buying thread. They are guided largely, of course, by the appearance of the spools. It was therefore a pertinent inquiry whether the two, or even three, changes above referred to were really sufficient to put the retailer and the consumer on their guard against supposing Nos. 110 to 200 to be six cord. This question was first put on cross-examination to Appellants' witness Auchincloss. He had upon the direct testified as follows regarding the deception of consumers by the alleged resemblance of the Merrick to the Coats:

"26 Q. State whether or not, from your experience as a practical salesman of thread or spool cotton, the six cord thread of the defendant, the Merrick Thread Co., when put up upon spools with the designs and labels shown on the samples you have produced of their manufacture, would be likely to deceive ordinary retail purchasers or customers of spool cotton into supposing that the said thread was the thread of the complainants, and give your reasons for any opinion you may express?

A. They would, decidedly, on account of the similiarity.

27 Q. Please give the details of similarity which, in your opinion, would be likely to deceive ordinary retail customers?

A. The knarling or embossed designs are almost exact copies of those of J. & P. Coats'; that's all.

* * * * * * * * *

31 Q. You spoke in answer to the 27th Q. of the similarity between the Merrick thread and that of J. & P. Coats' in respect to the knarling or embossed designs; in your opinion is there any similarity between the paper labels of the Merrick Thread Company's six cord 200 yard spools and those of J. & P. Coats', which would be likely to deceive ordinary retail customers?

A. There is; both labels are black and gold; there are differences in arrangement, but a general similarity.

32 Q. What have you to say as to the fact that on both spools these labels are combined with the embossed spool heads bearing the numerals of the cotton on the spool?

A. There is such general similarity as to cause one to be mistaken for the other in the hands of the ignorant.

33 Q. I notice, in answer to the 27th question, that you terminated

your answer by the words, "That's all;" please state what you meant by those words?

A. It was in response to an inquiry of the person who was taking down the evidence, and did not relate to the evidence."

Cross-examination:

"114xQ. You say in answer to xQ. 98 that Coats' 200 yard 8 to 100 have embossed upon spool head " lines and stars—some have lines and some have stars—forming the arbitrary symbol claimed by J. & P. Coats as part of their trade mark for six cord thread. The numbers from 110 to 200 have no such marks, stars or lines."

Do you consider that the embossed marks with the absence of the embossed numeral on the spool head of Nos. 110 to 200, together with the use of the words "spool cotton" instead of the words "six cord," form such a substantial variation from the markings of the number 8 to 100, as that consumers are not likely to suppose they are buying six cord thread when purchasing Nos. 110 to 200?

(Objected to as immaterial and as purely speculative, and because no inference on the subject can fairly be drawn from the previous testimony of the witness.)

A. It is beyond my depth.

115xQ. I hand you a specimen of No. 110 and of No. 100 spool of Coats' 200 yard thread, taken from Exhibits Coats' Samples 14 and 15, respectively. Please look at these two spools and state whether in your opinion, there is such a substantial difference in the mark and labels on No. 110 from those on No. 100, as that consumers are not likely to suppose they are buying six cord thread when purchasing No. 110; and, if you say they are not likely so to do, state why—give your reasons?

(Objected to as immaterial what the customer may or may not suppose in the absence of any representations on the subject.)

A. If I were buying thread myself, I would not have a moment's hesitation; one spool has the words "six cord" on it, and th other spool has not.

116xQ. And do you mean that it is your opinion that ordinary consumers would distinguish the two in the same way?

(Same objection.)

A. I see no reason why an intelligent person should hesitate in the matter; one spool has the words "six cords" upon it, the other has not.

117xQ. Please answer the question xQ. 116 as put with reference to ordinary consumers exercising such care as is ordinarily exercised in the purchase of this article?

(Same objection.)

A. I have no further opinion to express.

118 xQ. You did not hesitate to answer similar questions put you on the direct examination when asked to compare defendant's and

the complainants' spool heads; why do you hesitate, therefore, to answer xQ. 117?

(Same objection.)

A. What similar questions do you refer to?

119 xQ. I refer to questions 26, 27, 31 and 32, with their answers?

A. I had data to go by in answering those questions—facts known to me of cases where the one thread had been mistaken for the other.

120 xQ. You answered to Q. 32 that there was such *general similarity* as to cause one to be mistaken for the other in the hands of the ignorant, the comparison being between Merrick's & Coats' marks on spool heads; please express your opinion in answer to xQ. 117, and base your opinion on such experience and on such facts as as you may happen to be possessed of?

(Same objection.)

A. I answered Q. 32 from facts known to me; no one except yourself has ever raised this question before, and I decline to express an opinion.

Mr. Auchincloss is an intellectual, sober minded, hard headed successful business man. He is very deaf and did not answer these or any cross questions on the spur of the moment, but took the written record of testimony in his hands and pondered with great deliberation before he replied. And this was the best he could make of the dilemma in which he was placed. He realized that if he came out plainly and said there was sufficient in the slight differences between 8 to 100 and 110 to 200 to not deceive consumers, he would not be heard to say that there was likelihood of deception in the similarity of Merrick's to Coats'. On the other hand, if he admitted there was not sufficient difference between 8 to 100 and 110 to 200 to preclude deception, he admitted away that slender ground of reply appellants have to this charge against them of the six cord fraud. So he temporizes and makes shifting answers, and at last closes his mouth altogether, in which, of course, the objections of Appellants' counsel encouraged him. His answers, however, as a whole, tend to the opinion that he thinks there is difference enough between 8 to 100 and 110 to 200 to prevent deception. *A fortiori* is there more than difference enough between Merrick and Coats to prevent the most careless and near sighted from erring, especially as the name and nothing else is ever the test as to Coats' and the name is ever the test for all other threads, most of which, in-

cluding Merrick's, have moreover distinctive symbols, in addition to the name.

Upon the differences between appellants' boxes and spools of 8 to 100 and 110 to 200, see Hopkins, p. 332, Q. 251 to 255.

At p. 72, xQ. 70 to 84 and 178; Mr. Auchincloss got into much trouble, from which he never escaped.

Complainant's Exhibit "Coats' Three Cord Samples, Number 15," was a box of No. 110 Coats' 200 yard alleged six cord but really three cord thread. It bore on the top box label (see 78xQ.) the words, "Best Sewing Cotton for Hand and Machine." All the boxes of 110 which appellees had been able to find bore upon the top box label, not the above words, but the words, "Best Six Cord Cotton for Hand and Machine." Appellees were, therefore, surprised that this Exhibit 15 of 110 should be different, and they carefully examined Exhibit 15, and found that its label did not belong to that box, but was a 120 label, and they had reasons for concluding that some one had surreptitiously pasted a 120 "Best Sewing Cotton" label over the accustomed "Best Six Cord" 110 label on Exhibit 15. So Mr. Auchincloss is handed Exhibit 15, and another box of 110 with the accustomed "Best Six Cord" label of proper size, which is known as Defendant's Exhibit No 7, and is asked (72xQ.) to state whether the label on Exhibit 15 was not too small.

Appellants's counsel objected to all this line of questions, and after a little, when Mr. Auchincloss' head was going under water, instructed him he need not answer; but on motion by appellant to strike out and by Appellees to compel answer, the objections were overruled and answer required.

Mr. Auchincloss then answered:

"A. Some mistake of the box maker."

The question is repeated and he says he "can't explain it."

In answer to xQ. 74 he admits that the labels on Exhibits 15 and 16, being 110 and 120 respectively, are the same size every way. And in answer to xQ. 75 he admits that the label on Defendant's Exhibit No. 7, being 110, is of a size between the label on Exhibit 14 and Exhibit 15, being 100 and 120 respectively. In answer to xQ. 76 and 77 he admits that the labels on Coats' boxes containing 80, 90, 100, 120, 130 form, with Defendant's Exhibit 7, 110, a regularly graduated series as to size,

but that the same numbers with Ex. 15 do not form such a series He then says (78 and 79 xQ.) that the labels on 80, 90, 100, 120 and 130 are the usual labels for those numbers, and the labels on Complts.' Ex. 15 and Defts.' Ex. 7 differ in that one says "Best Sewing Cotton" on the top label, while the other says "Best Six Cord." Then comes an adjournment to the next day.

Mr. Auchincloss comes in the morning, prepared with a story to explain the presence of the "Best Six Cord" top label on Defts.' Ex. 7 of 110, *but he never explains the presence of the disproportionate label on Complts'. Ex. 15 of 110.*

The gist of the story is that some years ago Coats, under the influence of competition, decided to try and see whether the public wanted six cord any higher than 100, so they made as a test 110 of six cords for several years, and the boxes of this real six cord 100 were marked "Best Six Cord," and Defts.' Ex. 7 must be one of those trial boxes. He says the spools were all the time of the test labeled "Best Spool Cotton" as usual, which seems remarkable, since that change, according to Auchincloss. (xQ. 114 to 120) would have told consumers at once that the 110 was six cord. But they mark it six cord on the box and three cord (for that is what Auchincloss says "Best Spool Cotton" means) on the spool and then, with 100 and 110 both made of 180 yarn and both six cord, they expect if 110 six cord were really needed "the demand would be quietly turned from 100 to 110" "The expectation was not realized and after some years of testing this six cord 110, Coats returned to making it three cord." It is a complicated story and gives the public credit for a vast discrimination, sufficient we would think to enable them to distinguish Merrick from Coats, for they were expected to detect six cord when it was marked three, and to quietly turn their demand from one number to the other when both were in fact exactly alike. As the case went on, **appellees put in evidence boxes of Coats' 120 and 130 with a top "Best Six Cord" label,** and in Appellees' views this stamps the above story of Auchincloss as entitled to no credit. At the close of the story Auchincloss finally admits that Complainants' Exhibit 15 of 110 has a number 120 label on it, *but he does not attempt to explain that.*

Appellees, from an examination of that exhibit were satisfied that the 120 "Best Sewing Cotton" label had been surrepti-

tiously pasted over the "Best Six Cord" 110 label, and when their day in court should come they expected to prove that fact, but when that time came, although Complainants' Exs. 14, 16, 17, etc, were forthcoming, **Complainant's Ex. 15 had disappeared.**

At page 75, xQ. 79½ to 85, Mr. Auchincloss is asked and answers as follows:

"79½xQ. There is a large amount of number 110 three cord J. & P. Coats' thread, on 200 yard spools, in the hands of the trade in this country, the top label upon the boxes containing which bears the words 'best six cord cotton' and best six cord spool cotton; is not that so?

(Objected to as not cross-examination.)

A. It is not so; the sale of No. 110 thread is very small.

80xQ. I mean a large amount in proportion to the total amount of that number which is sold by you?

(Objected to as not cross-examination, and witness is instructed that he may decline to make any guess, or give any information at this time on the subject.)

A. I decline to add anything to answer to xQ. 79½.

(Objection subsequently overruled by Court.)

81xQ. And you decline to answer the last question, do you?

(Same instruction.)

A. Certainly.

(Objection subsequently overruled by Court.)

82xQ. When, if ever, did J. & P. Coats, or the Conant Thread Co., or you, or your firm, first begin to put 120 label on the top of 110 box, as appears in "Coats' Three Cord Samples, No. 15?"

(Same instruction.)

A. I don't know.

83xQ. Is that their custom now?

(Same objection and instruction.)

A. I don't know; I just happened to pick it up, that is all I know about it; both kinds were in our stock; I presume, but do not know, that the Conant Company are using that now; by that I mean 120 label on 110 box; I shall send all 110 with "best six cord" to be relabeled "best sewing cotton," as there is no intention of selling it as six cord thread.

(Objection subsequently overruled by Court.)

84xQ. Have you heretofore ordered any to be so relabeled?

(Same objection and instruction.)

A. No answer.

(Objection subsequently overruled by Court.)

85xQ. Will you now please look at the box containing number 90 200 yards six cord thread marked "Coats' six cord samples, number 13," and state whether the words "best six cord" appear twice upon the top label of the box?

A. They do.

Whether Mr. Auchincloss ever gave that order does not appear, but there are plenty of 110 boxes on the market to-day with "Best Six Cord" on the top label.

From xQ. 85 to xQ. 95 Mr. Auchincloss admits one after another the eleven similarities between the six cord, Nos. 8 to 100, and the three cord, Nos. 110 to 200, enumerated at page 113, 114 of this Brief; won't admit, 109xQ., that 110 to 200 nowhere have the words "three cord" on or about them; admits 96 and 97xQ. and 110xQ. to 113xQ. that he gets a six cord price for the entire line of 8 to 200, though 110 to 200 are three cord, while for a like length of three cord thread that is marked three cord and not marked six cord a much lower price is charged.

(Appellees' president, Mr. Hopkins, at p. 329, Q. 231 to 243, states the motive for this fraud, the profit from it and the circumstances of it fully.)

In answer to 105xQ., Mr. Auchincloss won't say that he knows of any other maker than Coats who uses, on boxes or elsewhere, the language, "Best Six Cord Spool Cotton, white and black, 8 to 200," but says the two Clarks use the words "Best Six Cord" on some of their boxes of three cord thread. These other great manufacturers had to do so, or Coats would have had a great advantage over them.

The people at the Merrick factories in Holyoke began to do this also, but the moment it came to Mr. Hopkins' knowledge he stopped it (see p. 301, Q. 50 to 54). And he also states the effect of the failure to designate the thread as six cord and of the actually making and marking it six cord (p. 303, Q. 61 to 67)

That Coats' numbers 110 to 200 are, in fact, understood to be six cord (see Hopkins and the disinterested and hostile witnessess):

Baldwin, p. 550, Q. 39 to 44; Bartley, p. 526, Q. 54 and Q. 63 and 64; Devin, p. 540, Q. 48 to 52; Pierce, p. 559, Q. 31 to 38; Whitmore, p. 577, Q. 11 to 20; Wiseman, p. 594, Q. 45; Cummins, p. 620, Q. 31 to 32; Le Boutillier, p. 626, Q. 28 to 37; Hopkins, p. 354, xQ. 483-4—p. 669, Q. 1; Young, p. 274, xQ. 52-56; Beale, p. 143, Q. 8, 9, 10, 19—xQ. 34-35.

* * * * * * * * * *

That six cord, or "best six cord," is the "best spool cotton," and that the words best spool cotton on 110 to 200 are there-

fore calculated to give the impression that the thread on those spools is six cord; see the disinterested witnesess:

Knox, p. 430, Q. 65, 70 to 75—xQ. 395, 396, 405, 410; Baldwin, A. G., p. 550, Q. 38 to 43; Bartley, p. 528, Q. 63, 64; Devin, p. 539, Q. 31, 32; Baldwin, G. P., p. 549, Q. 36, 37; Pierce, p. 560, Q. 37, 38, 39; Whitmore, p. 577, Q. 12 to 18; Wiseman, p. 594, Q. 44 to 45; Cummins, p. 620, Q. 32. See also Hopkins, p. 329, Q. 229, 250 to 256, and appellants' witness, Beale, p. 143, Q. 8, 9, 10, 19 and xQ. 34, 35.

Mr. Auchincloss, Thomas Russell and Theodore Ives, swearing for three of the companies of the **combination,** make a feeble attempt to show that the high numbers are better to be three cord than six, but if that be so why don't they plainly mark it three cord. Auchincloss, p. 63, Q. 15; Russell, p. 120, Q. 11; Ives, p. 107, Q. 11 to 13. It is not so, as appears by the testimony of many disinterested witnesses. See Hopkins, p. 298, Q. 24, *et seq.*, 210 to 213, 243, 244; Knox, p. 433, Q. 70, xQ. 405, 406; Le Pard, p. 505, Q. 38 to 45, esp. 43; Devin, p. 541, Q. 67, 68; Pierce, p. 559, Q. 30 to 36; Whitmore, p. 585, xQ. 125 to 129; Downs, p. 586, Q. 4 to 9; Cummins, p. 621, Q. 35.

Again the trio Mr. Auchincloss, Thomas Russell and Theodore Ives, and a number of jobbers, say there is very little of No. 110 to 200 sold, anyway, meaning the inference to be drawn that, if there be fraud, it is a small one, and there was not sufficient motive for a fraud. Possibly the profit from it does seem small to the "Spool Cotton Kings," whose yearly profits and wealth are so large. But none of them will tell even approximately what is the amount sold of their high numbers. See Auchincloss p. 75, xQ, 79½, 80, Ives, p. 107, Q. 8, 9, Russell p. 119, Q. 7 to 8; Brighston, Dallon; etc.

Mr. Hopkins' estimate is ½ of 1 per cent.; and figured at that rate the profit of the fraud by Coats alone on the sales of these high numbers alone amounts to **fifteen thousand dollars a year.** Hopkins, p. 331, Q 248; Whitmore, p. 577, Q. 19, 20, Pierce p. 563, x Q. 75 to 78.

But it is not only from these high numbers that the fraudulent proceeds are derived, but from an increased sale of the whole line of goods brought about by the natural belief of the public that the concern which can make six cord highest can make the whole line best, and this is of immense advantage to a concern like J. & P Coats, whose thread was known in every

hamlet in the land before the Merrick enterprise was born. See Hopkins, p. 414, Q. 1035, 1036, and p. 716, Q. 7.

Appellants themselves have in a measure confessed the fraud since the cross-examination of Auchincloss laid it bare. They have done or professed to do three things in the way of amendment, neither of them, however, touching the root of the matter.

1. Auchincloss said he should have the labels on top of 110 *box* changed from "Best Six Cord" to "Best Sewing Cotton."

2. He changed the reading matter in the little book, Defendants, Ex., 1883, advertisement in several particulars, as appears by comparing that with Deft's Ex., 1884, advertisement.

3. He has changed the box flap so that it reads "Best Six Cord white and black 8 to 100" instead of "8 to 200."

But these changes only serve to show a guilty self conviction, and no real amendment. They are trifling. The lion and eagle, the well-known six cord trade mark, still covers the boxes, and the spools and labels, and embossment upon them still remain unchanged, to say nothing of the other features, and the fraud and the profits continue as ever and the six cord line of goods is as before completed by a series of numbers which are in fact three cord.

Attention is called to the fact that this charge of fraud by appellees against appellants, the marking with the trade mark sued upon and selling three cord thread as six cord and at a six cord price, has, in past years, been one of the charges which appellants have themselves made against defendants in suits for infringement of appellants, marks in this same line of goods. The instance of Coats *v.* Willington Co. was disclosed by appellants' counsel, on cross-examination of Mr. Hopkins, as already alluded to, the language of the charge there was as follows:

> "And said thread of the respondents **is of an inferior quality, is not made of six cords, but are threads of only three cords**, and is manufactured of bad materials and contains only one hundred and fifty yards to the spool, and that the same is sold by the respondent for about one-half the market value of said genuine thread of the petitioners."

Again, in the case of these appellants, Coats *v.* Holbrook, 2 Sand., Ch. p. 645 Rep., (1845) where the subject matter was the same line of 200 yard six cord thread and where the burden of

the charge was in the use of the *Coats name*, etc., the following charge against the defendant appears at page 648, old paging 589, recited from the Coats Bill of Complaint in that case:

> **"That the spurious label as well as wrapper, state or show or would give a buyer to believe that the thread is one made from or with six cords, and that the quantity on each spool ran or measured to the length of two hundred yards: but in proof of such fraud or cheating, the spurious thread is only made with three cords or strands and was only about one hundred and fifty yards in length on each spool.**

Both there suits were brought to restrain the unlawful use of the name "Coats."

Appellants, so far as can be learned, have never brought a suit against anyone from 1842 till now, unless the defendants used the name of Coats (see Hopkins, p. 308, Q. 104 to 108 and 256.)

Appellants during all these years, have never complained of the use of any kind of a black and gold label upon which the maker used his own name and did not use "Coats" name (see Knox, p. 424, Q. 30 to 35).

The thread for which Mr. Knox was agent was a very poplar thread throughout the United States for eighteen to twenty years, from 1855 to 1874 (Q. 17, 26 to 30; see also Hopkins, p. 308, Q. 110 to 116).

Thus it again becomes clear that this suit is brought in order to give appellant, the exclusive use forever of the expired patented design, at least so far as the numerals are concerned, with all the beauties and utilities of that use, and in spite of the fact that such use of those descriptive useful numerals constituted the entire novelty of that Design Patent.

It is submitted that appellants have no standing in this Court.

The law upon this question of misrepresentation and fraud in a trade mark, or in the business connected with it is clear,

In *Manhattan Medicine Co. v. Wood.* 108 U S., 218 (1882):

Complainant, a New York corporation, assignee by mesne

assignments of Moses Atwood, of Georgetown, Mass., in a medicine business and of all his trade marks, labels, etc., marked the medicine which they made in New York, just as Atwood had originally marked it when made in Mass., to wit: "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass.," blown in the glass of the bottle, and a label pasted on telling the virtues of the medicine and how it was to be taken and that it was manufactured by Moses Atwood, Georgetown, Mass., and sold by his agents throughout the United States.

Held, a misrepresentation on part of complainant, making the trade mark void, even as against a Maine manufacturer who simulated the bottles and labels and used the same words and names falsely.

> Justice *Field:* "A court of equity will extend no aid to sustain a claim to a trade mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine. * * * [Cites with approval the Leather Cloth Co. *v.* The American Leather Cloth Co., 4 De G. and S., 137, and on appeal, 11 House of Lords' cases, 523; also Pidding *v.* How, 8 Simmons, 477 Perry *v* Truefitt, 6 Beav., 66; Fetridge *v.* Wells, 4 Abbott, N. Y., 144; Seabury *v.* Grosvenor, 14 Blatchf., 262; Hobbs *v.* Francais, 19 How. Pr., 567; Connell *v.* Reed, 128 Mass., 477; Palmer *v.* Harris, 60 Penn. St., 156.]"

Pidding v. *How*, 8 Simons, 477, (1837, English):

Complainant sold "Howqua's Mixture"; but he had made false statements to the public as to the teas of which his mixture was composed, and as to the mode in which they were procured." Injunction refused.

Perry v. *Truefitt*, 6 Beav., 66 (1842, English):

Complainant sold "Perry's Medicated Mexican Balsam," but "in his advertisements to the public he had *falsely* set forth that the composition was a highly concentrated extract from vegetable balsamic productions of Mexico, was prepared from an original recipe of the learned J. F. Von Blumenbach, etc." Injunction refused.

Fetridge v. *Wells*, 4 Abbott (N. Y.) 144, (question of fraud very elaborately and ably treated by Chief Justice Duer).

Complainant sold "Balm of a Thousand Flowers" Defendant sold "Balm of Ten Thousand Flowers" But it appeared

that complainant's article was no balm at all, but was in reality only a soap composed of oil, ashes and alcohol (see opinion). Injunction refused.

So Seabury v. *Grosvenor*, 14 Blatchf., 262.
Hobbs v. *Francais*, 19 How., N. Y., 567.
Connell v. *Reed*, 128 Mass., 477.
Palmer v. *Harris*, 60 Penn. St., 156.
Wolf v. *Burke*, 56 N. Y., 115.

In *The Leather Cloth Co., Ltd.*, v. *The Amer. Leather Cloth Co., Ltd.*, 4 De G. J. and S., 137, the plaintiff's label contained the words, "Tanned Leather Cloth, Patented January 24, '56," among other words of description and of origin. As matter of fact the greater quantity of the goods sold by plaintiff with the label attached were not tanned, and so were not under the patent, which was a patent for the tanning.

Says Lord *Westbury*, the Chancellor, on appeal, (p. 147):

"The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trade mark, as in the case of the violation of any other right of property. But when the owner of a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, *in his trade mark, or in the business connected with it*, be himself guilty of any false or misleading representation; for if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a Court of Equity. The question then arises, what amounts to a material false representation? * * * * Of these several untrue statements the most material is the false representation made by the plaintiff's label that every piece of cloth so stamped or branded is tanned, and included in the patent of January, 1856, which was a patent for tanning leather goods. * * * * The Vice-Chancellor is apprehensive that if he refuses the plaintiff relief he must hold, that where the name of a deceased partner is continued in the firm by his surviving partners they would be guilty of a fraud upon the public. To continue the old style of a firm is a very different thing from *making false representations with respect to a vendible commodity in order to give it greater value, and create for it a greater demand in the market.* The plaintiffs impose upon the public by selling goods, which are in reality made by themselves at their manufactory at *West Ham*, as being the goods of the *Crockett International Leather Cloth Company* and as having been manufactured by *J. R. and C. P. Crockett*, who were the original inventors and manufacturers [and plaintiffs' assignor of business and trade marks]; and further, they describe

and sell untanned goods as being tanned and included in a patent which has not yet expired. Their request is to be protected, *and therefore justified*, in continuing to make these untrue statements to the public in order to secure a monopoly for their commodity.

"There is a homely phrase, long current in this Court, that a plaintiff must come into equity with clean hands. That is not the case with the present plaintiffs, whose case is condemned by the principles to which they appeal, and I must therefore reverse the decree of the Vice-Chancellor and dismiss their bill; but as I do not approve of the conduct of the defendants, I dismiss it without costs." (Affirmed on Appeal to House of Lords, 11 H. of L. Cas., 523.)

In *Consolidated Fruit Jar Co.* v. *Dorflinger*, 2 Am. L. T. Rep. (N. S.), 511 (1875), Judge *Cadwalader* held that where a patent for the article had existed, but had been judicially declared invalid, the words (claimed as a trade mark) *Mason's Patent, Nov. 30th, 1858*," "*Mason's Improved*," "*The Mason Jar of 1858*," were not proper trade marks protectable by a Court of Equity for the reason that they amounted to a representation to the public that the article was held under a good and valid and existing patent, which was untrue.

In *Cheavin v. Walker*, Eng. Law Rep., 5 Chan. Div., 850, (1877), the filters, which were stated to have acquired great reputation both in this country and abroad, and obtained several prize medals and diplomas, bore a tablet which, after 1867, was as follows: "*G. Cheavin's* Improved Patent Gold Medal Self-cleaning Rapid Water Filter, *Boston, England*"; above which was a medallion containing the royal arms, surrounded by a band or garter with the words "By Her Majesty's Royal Letters Patent," and the filters were generally known and asked for in the trade and by the public as *Cheavin's* filters. The patent of 1862, on the principle of which the plaintiff's filters were manufactured, had been allowed to lapse in 1865. The defendants, *Brightman* and *Bailey*, were formerly in the plaintiff's employ, and had recently commenced and were now carrying on at *Boston* the business of manufacturing and selling filters made upon the principle of the plaintiff's filters, and bearing externally so close a resemblance to them that the difference between them was not perceptible except upon a close examination.

The defendants placed upon their filters a tablet or inscription bearing the following words: "*S. Cheavin's* Patent Prize Medal Self-cleaning Rapid Water Filter, Improved and Manufactured by *Walker, Brightman & Co., Boston, England*

The defendants had also issued circulars relative to these filters, in which the phraseology of the plaintiff's circulars relative to his filters was to some extent copied.

On finding out, in August, 1876, that the defendants were making and selling these filters, the plaintiff called upon them to desist from infringing his trade mark. Some correspondence took place. The defendants, in order to meet the plaintiff's objection to the prominence given to the words "S. Cheavin," and to avoid litigation between near relatives (*Brightman* being the plaintiff's brother-in-law), offered to alter their labels by reducing the size of the words "S. Cheavin's," and to increase the size of the words "Walker, Brightman & Co." The plaintiff insisted upon his right to have the name "Cheavin" entirely removed from the defendants' filters, and this not being conceded, he had *issued a writ and delivered a statement of claim, by which he claimed an injunction to restrain the sale of filters bearing the name "Cheavin" or "S. Cheavin" marked or inscribed thereon, or any colorable imitations of the inscriptions used by the plaintiff.*

Vice Chancellor Bacon held that the plaintiff had a good trade mark as claimed, and that it had been deliberately, intentionally and in bad faith, imitated and adopted by the defendants. But

This was *reversed* on appeal, *James*, L. J., saying (p. 863):

"With respect to the question of misrepresentation, I agree with the Master of the Rolls [see *Jessel*, M. R., p. 862]. The question is whether the inscription on the plaintiff's filter contained a representation of what was false. No doubt the plaintiff did not mean to tell a lie, but when the matter comes into a Court of Justice, the Court cannot assist in the continuance of misrepresentation. Here, taking the whole inscription together, including the royal arms and the words, "By Her Majesty's Royal Letters Patent," I think it indicates the present continuance of the patent. It was sufficient to lead the public to the conclusion that the article was made according to a patent which had not expired, but was still continuing.

"The plaintiff had no right to embarrass the world by claiming the benefit of a patent which had expired.

"The last point for decision is whether the defendants have done anything that amounts to a fraud, in having imitated the plaintiff's inscription in such a way as to lead an unwary purchaser to suppose that the article was manufactured by the plaintiff. In my opinion nobody would suppose that it was manufactured by the plaintiff. The defendants expressely and very plainly say that it is manufactured by *Walker, Brightman & Co. The truth is that the case really made by the plaintiff is not that the defendants pretend that the filters are*

made by him but that they allege that they are made under Cheavin's patent; to which the plaintiff has no right to object."

Says *Baggallay*, L. J. (p. 865):

"*If we only had to deal with the part of the inscription which is described as a trade mark, I should have thought that it contained no misrepresentation; but you cannot disconnect it from the medallion and the royal arms.* An ignorant person would suppose that the article was protected by the patent—that is a sufficient ground for refusing the plaintiff relief. But he also fails in the case made in his statement of claim, that the public were led to believe that the filters were manufactured by the plaintiff. In my opinion there is nothing in the defendants' inscription which would mislead unwary persons; there is nothing in the shape or arrangement of the letters which shows an intention to imitate the plaintiff's inscription.

"The Vice Chancellor thought that the words '*Cheavin's Patent*' were calculated to deceive the public. But 'Cheavin's Patent' is a *correct* description of the principle according to which the article was made, and then there follows a distinct statement that it was manufactured by *Walker, Brightman & Co.* Therefore on this ground also the case made by the plaintiff's claim fails. The appeal must be allowed and the action dismissed with costs."

In *Schumacher & Ettlinger* v. *Schwenke*, 36 Off. Gaz., 457 (1886), Judge *Bookstaver* in denying an injunction to restrain infringement of an alleged trade mark said:

"When the owner of a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not *in his trade mark, or in the business connected with it*, be himself guilty of any false or misleading representations; for if the plaintiff makes any material false statement in connection with the property he seeks to protect he loses, and very justly, his right to claim the assistance of a 'Court of Equity' (Manhattan Medicine Co. *v.* Wood, 108 U. S., 218, 224). The rule is well settled that the party claiming protection against the fraudulent conduct of another must himself be free from the imputation of fraud. *N. Y. Card Co.* v. *Union Card Co.* (39 Hun, 611), and cases there cited."

In *New York Consolidated Card Co.* v. *The Union Playing Card Co.*, 39 Hun, 611 (1886), Judge *Daniells* held as follows, and we invite the attention of the Court to the case:

Good faith and fairness in dealing on the part of the plaintiff is exacted before an action of this description can be maintained. Where that may appear there the law will protect the device adopted as a trade mark by the plaintiff against its use by other parties. For that use would, in that state of the case, be not only a fraud upon the party entitled to the use of the device, but also upon the

public, so far as purchasers might be induced by it to purchase the simulated article in place of that to which the device, or mark, should be legally applied. But where the party complaining of the act of another is himself, or itself chargeable with a false representation in the use of the device, there the law will not interfere for its protection. For the rule is settled that a party claiming protection against the fraudulent conduct of another, must himself, in the business, be free from the imputation of fraud upon his part. If he is not the Court will not aid or assist him by maintaining his own fraudulent practice, in restraining that of another. This principle has been frequently examined and considered and applied to controversies of this and similar description (Pidding *vs.* How, 8 Simons, 477; Fetridge *vs.* Wells, 13 How., 385; Palmer *vs.* Harris, 60 Penn., 156; Hobbs *vs.* Francais, 19 How., 567; Marshall *vs.* Ross, L. R., 8 Eq., 651; Edelsten *vs.* Vick, 11 Hare, 78; Manhattan Medicine Co. *vs.* Wood, 108 U. S., 218, 224).

In the last case the statement of the legal principle was approved by which it had been held that, 'when the owner of a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade mark, *or in the business connected with it*, be himself guilty of any false or misleading representations; for if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity; and it was in like manner approved in Hazard *vs.* Caswell (93 N. Y., 259).

This principle was held to have been violated by the plaintiff in the manner in which these cards were put up and sold. This alleged violation consisted in the statement, or representation, that the plaintiff's cards were patented and sold under the appellation of patent squeezers. This representation was made upon one card, included in each pack, upon the left of the lower end of which was the word 'patent,' in the middle the words 'thirty-five,' and on the right the word 'squeezers.' The wrappers in which the cards were put up also contained upon the left side the words, 'patent squeezers,' and at the top 'squeezers, No. 35,' and at the bottom the word 'patented.' The wrapper in which one dozen packs were put up contained upon the left and right sides of the paper the words 'patent' upon one corner and 'squeezers' upon the other. And conspicuously on the outside in the center the words, 'Hart's Patent Squeezers, manufactured by N. Y. Consolidated Card Co., New York.' The term 'squeezers' was stated to indicate that when the cards are squeezed from the corner they are separated so as to exhibit a small index figure on each card at the corner, and in that manner to enable the player to observe the cards he should have in his hands, without their liability to be seen by others. A patent for this device had been obtained in the year 1864, and assigned to the plaintiff, but it expired in 1881, and at the time in controversy the cards manufactured by the plaintiff were in no respect whatever within the protection of any patent. The statement, as it was made upon

one of the cards of each pack and upon the wrappers in which cards were put up and sold by the plaintiff, was such as to indicate that they were at the time to which the action relates protected by a patent. That would be the understanding ordinarily produced in the minds of persons dealing with the article, from the use of the term 'patent' and 'patented,' as they were connected with the sale of the plaintiff's cards. These words were not used combined with any others importing the fact that they were manufactured or sold under a patent previously existing and which at the time had expired. Upon the face of the wrapper of each pack, and also on the wrapper of a dozen packs of cards, they were called 'patent squeezers.' Wherever the phrase appeared it was so employed as to indicate the existing or present protection of a patent. This was an important fact, and as the plaintiff had no patent at the time in controversy, it formed a material misrepresentation, which would ordinarily affect the conduct of buyers of these cards, limiting and restraining their dealings in them as a patented commodity.

* * * * * * * * *

The point has been taken, in support of the appeal, that the use of the word patent and patented, in the manufacture and sale of the plaintiff's cards, was merely collateral to the device itself, which was made use of as the plaintiff's trade mark; and when used in that manner, even though it should be a misrepresentation, the fact would not deprive the plaintiff of an injunction restraining the use of a trade mark by a competing dealer. That view of the law, but upon a different state of facts, was adopted and supported in Ford *v.* Foster (Eng., L. R., 7 Chan. App., 611) and Millington *v.* Fox (3 Myl. & C., 238). But this was not a collateral misrepresentation within the rule supported by these and other cases, for the fact misrepresented accompanied each sale of the article which was made. It was impressed upon one of cards, and it was conspicuously placed and repeated upon each of the wrappers, so that it was impossible for a person to buy either a single pack or a dozen packs of the cards without being immediately confronted with the representation that the article was manufactured and sold as a patented article. This representation was immediately connected with the article itself, which was sold, and did not, as it did in the case to which reference has been made, consist of an advertisement or a mere accompanying invoice.

* * * * * * * * *

The plaintiff also endeavored to maintain this right to use the words patent and patented in this manner in its business, by the fact that it had recorded its trade mark under the act of Congress and was at liberty to refer to that as a patent. But the wide difference between a patent and a mere trade mark would seem to be sufficient to expose the fallacy of his position. But if it would not, the further fact that the act of Congress under which the record was made was unconstitutional, and, therefore of no effect, would deprive this position of its support. (U. S. *v.* Steffens, 100 U. S., 82.)

* * * * * * * * *

This misrepresentation, even if the device adopted by the plaintiff as its trade mark was infringed or used by the defendant, prevented this action from being maintained. The direction given for the dismissal of the complaint was warranted by the law applicable to the facts proved, and the judgment should be affirmed, with costs.

Davis, *P. J.*, and Brady, *J.*, concurred.

Judgment affirmed with costs."

In *Clotworthy* v. *Schepp*, 42, *F. R.*, *p.* 62, the fact that Complainant called his preparation "fruit" puddine, while it contained no fruit, was one reason for denying an injunction.

In *ex parte M. Bloch & Co.*, 40 *Off. Gaz.*, 443 (July, 1887), Commissioner *Hall*, in a carefully considered opinion, and citing many of the leading authorities, refused to register as a trade mark for whisky the words "Knights of Labor Whisky" in a circle surrounding the words (arranged above and below each other on straight lines) "Distillery," and "K. of L.," and "Sour Mash," holding that it necessarily amounted to a misrepresentation as to the origin of the goods.

In *Solis Cigar Co.* v. *Pozo*, 26 *Pac. Rep.*, 556, plaintiff marked cigar boxes "Habana," while the cigars were only one-third Havana tobacco Held guilty of fraud, and for that and other reasons relief was denied.

In *Palmer* v. *Harris*, 60, *Pr. St*, 156, relief was denied, although the fraudulent language was in the Spanish tongue.

In *Koehler* v. *Sanders*, 122 *N. Y.*, 65, plaintiff was denied relief because his business title of a "banking" company was not rightfully applicable to his business, which was that of buying and selling foreign bonds.

In *Hobbs* v. *Francais*, 19 *How.*, *Pr.* 567, relief was denied the plaintiff because the goods dealt in by him were, contrary to the fact, represented to be of foreign make.

In most of the above cases infringement was clear, in many barefaced, and but for plaintiffs' fraud, plaintiff would have secured the relief prayed for.

It is clear from these cases that a misrepresentation is *material* which tends to make the article a better selling article as, for instance, ascribing to it good qualities that it does not possess; and it is also clear that this misrepresentation need not be accomplished by any part of the specific trade mark proceeded upon, but it is sufficient to defeat the action if complainant has been guilty of misrepresentation and unfair dealing in the

business in which the trade mark is used and in connection with the use of the trade mark.

Appellants in this case have represented that their spool cotton on 200 yard spools of numbers 110, 120, 130, 140, 150 and 200, is six cord when in fact it is three cord, and have used at least in part the alleged trade mark in suit for that purpose, and this appears because the thread from Nos. 8 to 200, inclusive, is all :

1. Boxed in the same kind of boxes in shape, color and construction.

2. Every box has upon its bottom the Lion and Eagle, "Trade Mark for the United States," claimed to be and recognized as the trade mark for J. & P. Coats' Best Six Cord Spool Cotton, and those words form part of the mark.

3. Every box has the same symbol upon the cover.

4. All the boxes of 8 to 100, inclusive, and many of the higher numbers, have the following language upon the flap within the box, "J. & P. Coats' Best Six Cord Spool Cotton, White and Black, 8 to 200."

5. Boxes 8 to *110*, inclusive, and some of 120, 130, have the following on the cover, "Best Six Cord Cotton, for Hand and Machine."

6. Above *110* these words are changed so as to read, "Best Sewing Cotton, for Hand and Machine."

7. The gulf between six and three cord is bridged by the use of Best Six Cord on top of 110, which becomes Best Sewing Cotton in 120, etc.

8. On the bottom of every box appear the words, "J. & P. Coats' Best Six Cord Spool Cotton"

9. The spools, together with the labels and embossment, are exactly alike, through the line 8 to 200, except in two, Mr. Auchincloss thinks three particulars. (1.) The quality words, "Best Six Cord" on 8 to 100, inclusive, are changed on 110 to 200 to "Best Spool Cotton." (2.) The numeral is omitted from the peripheral wooden embossment. (3.) Mr. Auchincloss (C. R., p. 95, xQ. 98) attributes importance to the difference in the ornamental embossing, aside from the numeral.

10. In Defendants' Exhibit No. 8, Coats' 1883 advertisement, is the following notice: "J. & P. Coats' Best Six Cord Spool Cotton in 100-doz. cases, 8 to 100, 10-doz. parcels, 8 to 200."

11, On their commercial bills and bill heads the whole line is charged as six cord, and at the six cord price.

The bill of complaint in this case as in the case of Coats v. Willington, charged appellees' thread with being an inferior thread.

The charge was unwarranted, and it is hard to believe that appellants did not know it was unwarranted when they made it.

1. (See Hopkins, p. 325, Q. 206 to 213.) Mr. Hopkins, in answer to Q. 25, p. 719, D. R., when asked how the Merrick Thread Co. established and built up a 200 yard six cord business of such magnitude, gives his first reason as follows:

> "First, by making thread of the very best quality that it was possible to make."

In stating the purpose of the managers of the Merrick business, Mr. Hopkins says (p. 297; Q. 13):

> "The purpose has been to found and build up, in this country, a manufacture of spool thread that should be of the best quality, and make the same profitable to the stockholders of the company on the merits of the goods produced."

At page 324, Q. 205, he says: "We think Merrick's is better than Coats';"

2. The Merrick 200 yard six cord thread is and has been for four or five years, six cord, in all the numbers made by it, to wit, up to and including No. 140 (see Hopkins, D. R., p. 301, Q. 47 to 52). It is admitted that no other concern makes six cord above 100.

3. One or two witnesses of appellants, and many of appellees say that the threads of the four combination companies and of Merrick's are all equally good, or one as good as the other.

Pierce, p., 564, xQ. 97, 98; O'Keefe, p. 105, Q. 34; Pierce, p. 561, Q. 49, xQ. 98; Bartley, p. 532, xQ. 108; Devin, p. 538, Q. 18 to 23; Cummins, p. 621, Q. 36, 37; Whitmore, p. 584, xQ. 96, 97, 98; Hart, p. 686, xQ. 66; 3½ Downs, p. 589; Q. 39, and p. 590, xQ. 52 to 55; A. G. Baldwin, p. 514, Q. 48, 49.

4. Appellees' witness Phillips proved by actual test the superiority of Merrick's to Coats', by tests which he describes. (See p. 691, Q. 7 to 12; fol. 1380.

5. Mr. Young, appellants' witness and agent, admitted on his cross examination that both in those tests of Phillips, and in some which he himself made, the Merrick's proved superior to Coats'. (See Young, p. 276, xQ. 76 to 81.)

6. Merrick's brings the highest price; is never sold for less than 5 cents a single spool. Cox, appellants' witness, and Seely and Le Boutillier, appellees' witnesses, give numerous instances where Coats' is sold to the consumer at less than 5 cents the single spool. (Cox, p. 194, xQ. 41; Seely, p. 646, Q. 31 to 36; Le Boutillier, p. 624, Q. 9, xQ. 74.) It is believed that no such instance of such a sale of Merrick's thread has been shown.

7. Auchincloss stated on his direct examination, comparing Coats' and Merrick's, "I consider it (Merrick's) inferior in quality and reputation." Appellees being convinced that they used for their thread better material than Appellants, proceeded, on cross examination, to question Mr. Auchincloss as to the quality of materials used, but Mr. Auchincloss could not be brought to answer the question and so submit to a fair comparison. (See Auchincloss, p. 86, xQ. 140 to 146.)

8. Appellants have, by many witnesses, sought to prove that Merrick's is sold cheaper than Coats', but they do not mean to consumers. They mean simply that appellees sell to retailers cheaper than they sell to jobbers. That is true. Appellees skip the jobbers, and sell to retailers first hand, and so retailers get Merrick's a little the cheaper because the jobbers have not had their profit out of it. This is the sum total of appellants' cry about relative prices. Appellees' methods of reaching the public differ from appellants' in just that respect. (See Hopkins, p. 324, Q. 201; Auchincloss, p. 87, xQ. 146.)

The above considerations make it clear that Merrick's 200 yard six cord thread, instead of being inferior, is superior to Coats' This fact, together with the fact that the retailer makes a little more profit in the sale of it, and the fact that the company has had an upright and capable management for twenty years, accounts for its gradual growth to its present position.

In conclusion of this brief we submit as follows:

If the action is on the specific trade mark alleged and defined in the Bill of Complaint, then it must fail.

1. Because that alleged trade mark was in part patented to complainants in the Design Patent of 1870 which expired April 5, 1877, and the rest of the alleged had been long in universal use.

2. Because that alleged trade mark is in substance a mechanically and otherwise useful and ornamental mode or manner of describing the size of the thread wound on the spool.

3. Because that alleged trade mark does not in fact and never has indicated or denoted the origin or manufacture of the thread on the spool, excepting by the name. Origin is denoted by the name and name only.

4. Because every feature of the alleged trade mark is descriptive except the *name* J. & P. Coats, *the line of embossing and the location and size* of the letters and figures denoting the number, quality and length of the thread. And appellees use no one of these distinctive features.

5. Because that alleged trade mark is not used by appellees nor is any colorable imitation thereof, nor anything that has, in fact, deceived or is likely to deceive as to the origin or manufacture of appellees' thread or otherwise or that is calculated to deceive.

If the action is attempted to be maintained on the ground of general resemblance of appellees' thread to appellants' thread in the way in which it is put up or dressed for sale in the market, and irrespective of any specific trade mark, then it must fail.

1. Because no *intent* on appellees' part to deceive as to the origin or manufacture of its thread has been shown, and no intent is inferable from any of its acts, on the contrary, appellees' whole purpose and effort and *achievement* has been shown to be to create and maintain a name and reputation and permanent good will for itself as a manufacturer of 200-yard six cord cotton thread, to bring the name "*Merrick Thread Co.*" into the highest and widest repute as the maker of the best spool cotton in the world. The "Merrick" spool cotton has been shown in this case to be better than the "Coats" cotton, and the latter was theretofore the standard cotton of the world. A pirate upon the good will of J. & P. Coats would make an inferior thread to theirs; he would have nothing to lose by it and everything to gain. A young manufacturer in a new field, sailing legitimately under his own flag, would have everything to lose by such a course and nothing to gain.

2. Because there is, in fact, no such resemblance in the dress of appellees' thread to that of appellants' as would deceive ordinary customers as to the origin or manufacture of appellees' thread, giving ordinary care in buying.

3. Because no such deception in fact has been shown to have occurred, and it is clear that it would not be likely to occur, and certainly that it would not occur as the probable and ordin-

ary and usual effect of the dress of appellees' thread. That dress, in so far as it speaks for itself at all, either by origin, signification or by association, says that the thread is of the make of the Merrick Thread Co., and is of such and such quality and size and length, and it says nothing more.

4. Because every specific act and thing done by appellees in dressing up its 200-yard six cord thread for the market was done for a good and sufficient reason, and was legitimately done; and it had a right to adopt every detail that it has adopted; and if there is any resemblance at all between its thread and that of appellants', it is because both are the staple article known in the market as 200-yard six cord thread, on which both have embossed the numeral size of thread on the wood of the spool, as all the world may do, for it is *publici juris*.

In any view of the case this appeal must fail.

5. Because the Appellants do not come into this Court of Equity with clean hands. They have employed the alleged trade mark and the dress and make up of their cotton thread as the instrument to perpetrate upon the public the very fraud which they charged upon Holbrook and upon The Willington Company in 1851 and 1845—a fraud which is all the more heinous because it has been a source of great profit to the Appellants through a long course of years; and all the more reprehensible because the ordinary purchaser is unlikely to detect the imposition. Neither does the fact that the other members of the spool cotton combination are more or less guilty of the same practices excuse the fraud. Nor can the the Appellants escape now the consequence of their fraud on plea that they carefully and conscientiously left the *numeral* (which denotes the size of the thread) off of the embossing on all the *fraudulent* spools. That very act proves conclusively deliberate premeditation in the fraud.

We submit that the bill should be dismissed with costs.

New York, April, 1893.

W. C. WITTER,
W. H. KENYON,
Of Counsel for Appellees.